

No. 15712

United States
Court of Appeals
for the Ninth Circuit

BABETTA SCHMIDT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

ABRAHAM BERRY,
2408 Russ Bldg.,
San Francisco 4, Calif.,
For the Petitioner.

CHARLES K. RICE,
Asst. U. S. Atty. General,
Dept. of Justice,
Washington 25, D. C.,
For the Respondent.

The Tax Court of the United States

Docket No. 54932

BABETTA SCHMIDT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1954

Sept. 27—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 28—Copy of petition served on General Counsel.

Nov. 12—Answer filed by General Counsel.

Nov. 12—Request for hearing in San Francisco, Calif., filed by General Counsel.

Nov. 17—Notice issued placing proceeding on San Francisco, Calif., calendar. Service of Answer and Request made.

1956

July 20—Hearing set August 27, 1956, San Francisco, Calif.

Aug. 29—Hearing had before Judge Oppen on the merits. Case submitted after trial. Filed at hearing: Entry of appearance of Tom B. Markley, as counsel; Motion to amend petition—Granted and served 8/29/56; Amendment to Petition and Answer to Amendment to Petition, Stipulation of Facts, filed at hearing. Briefs due 10/29/56; Replies due 11/29/56.

1956

Sept. 17—Transcript of Hearing 8/29/56 filed.

Oct. 26—Brief filed by Petitioner—10/30/56 served
(served late 3-11-57).

Oct. 29—Brief filed by Respondent—10/30/56
served.

Nov. 29—Reply Brief filed by Petitioner. 11/29/56
served.

1957

May 14—Findings of Fact and Opinion filed—
Judge Oppen—Decision will be entered
under Rule 50. Served 5/14/57.

July 31—Agreed computation filed.

Aug. 2—Decision entered, Judge Oppen, Div. 14.
Served Aug. 5, 1957.

Aug. 14—Petition for Review by U. S. Court of
Appeals for the Ninth Circuit filed by
Petitioner.

Aug. 14—Proof of Service of Petition for Review,
filed.

Aug. 14—Designation of Contents of Record on Re-
view, filed.

Aug. 14—Proof of Service of Designation of Con-
tents of Record on Review, filed.

Aug. 14—Entry of appearance of Abraham Berry,
as counsel, filed.

The Tax Court of the United States

Docket No. 54932

BABETTA SCHMIDT,

Petitioner,

vs.

THE COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiencies plus penalties set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Bureau symbols A:R:90-D:HMB) dated June 30th, 1954, and as a basis for her proceeding alleges as follows:

1. The petitioner is an individual taxpayer who resides at 1395 Hampshire Street, San Francisco, California. All of the returns for the periods here involved were filed with the Collector and/or Director of Internal Revenue for the 1st Collection District, San Francisco, California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit A) was mailed to petitioner on or about the 30th day of June, 1954, and was received by her shortly thereafter.

3. The deficiencies as determined by the Commissioner are in income taxes for the calendar

years 1944, 1945, 1949 and 1951 of which \$1,250.00 is in dispute, but with respect to the calendar year 1951 only. The penalties asserted by the Commissioner are for the alleged failure by petitioner to file timely returns, and in respect to which the following years and amounts of said penalties are here in dispute:

Calendar Year	Penalty
1945	\$682.15
1946	44.14
1947	137.87
1948	125.15

Also involved in this proceeding are like penalties asserted and collected by the Collector and/or Director at the time said returns were filed. Such payments of penalties (which are exclusive of the foregoing) were all paid by petitioner to said Collector and/or Director and are as follows:

Calendar Year	Penalty Asserted and paid
1945	\$257.40
1947	459.29
1948	180.88
1951	246.82

4. The determinations of tax and penalties set forth in the said Notice of Deficiency are based upon the following errors:

4 (a) With respect to the tax year 1951, respondent should have found and determined that

the total tax paid by petitioner during and for said year was the sum of \$7,475.43.

4 (b) The respondent failed and refused to take into account the mitigating circumstances which precluded petitioner from filing timely returns.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

5 (a) Petitioner made payments in the aggregate of \$7,475.43 to the Collector and/or Director for the First Collection District, San Francisco, California, with respect to and to be applied against her 1951 income tax liability.

5 (b) Petitioner, through her then public accountant, timely filed forms 1040 ES, properly estimated her tax, and fully paid the estimated tax shown thereon, and all of this for and during all of the years involved herein wherein respondent seeks to assert and has asserted and collected penalties for failure to timely file forms 1040. Said forms 1040 ES were prepared by petitioners said public accountant who had prior to the years involved in this proceeding, prepared and filed for petitioner complete forms 1040. At all times herein mentioned, petitioner kept complete records of her income and expense and made such records available to said accountant for the purpose of his preparing all the necessary federal income tax returns. Petitioner is a woman of some sixty-eight years and who did, at all times mentioned herein, sign all returns presented to her for signature by said accountant who

thereupon filed the same for her, and petitioner at all times prior to and during the periods in controversy herein, relied upon said accountant to file both forms 1040 ES and 1040. Petitioner was informed and believed that all such returns had been timely filed. Upon discovering that said accountant had negligently or inadvertently failed to file said forms 1040, petitioner immediately employed another public accountant to do so and the same were all filed simultaneously during the month of August, 1952.

Wherefore, the petitioner prays that this Honorable Court hear this proceeding and find and determine:

6 (a) That petitioner paid to the Collector and/or Director sums in the aggregate of \$7,475.43 with respect to her 1951 tax liability of \$7,349.58; and that she overpaid said tax liability by the sum of \$125.85 and is entitled to a refund therefore.

6 (b) That petitioner's failure to timely file forms 1040 for all the years involved in this proceeding was not without just and reasonable cause and that no penalties are due and owing by petitioner.

6 (c) That the penalties heretofore paid by petitioner as alleged in paragraph 4 (b) were paid, that the same should not have been asserted and paid and that the same should be refunded to petitioner.

6(d) For such other and further relief as to this Honorable Court may seem just and proper.

Respectfully submitted,

/s/ A. D. McNEIL,

Counsel for Petitioner.

Duly Verified.

EXHIBIT A

U. S. Treasury Department
Office of the District Director of Internal Revenue
100 McAllister Street
San Francisco 2, California

In Replying Refer to:
Chief, Audit Division,
A:R:90-D:HMB.

Mrs. Babetta Schmidt,
1395 Hampshire Street,
San Francisco, California.

Dear Mrs. Schmidt:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1944, to December 31, 1949, inclusive, and December 31, 1951, discloses deficiencies of \$1,977.05 plus penalties of \$989.31 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies and penalties mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies and penalties. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Audit Division, 100 McAllister Street, San Francisco 2, California. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies and penalties, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner.

By /s/ RICHARD NICKELL,
Acting District Director of
Internal Revenue.

Enclosures:

Statement,
Form 1276,
Agreement Form,
Exhibits A and B.

Statement

Chief, Audit Division
A.R:90—D:HMB

Mrs. Babetta Schmidt
1395 Hampshire Street
San Francisco, California

Tax Liability for the Taxable Years Ended December 31, 1944,
to December 31, 1949, inclusive, and December 31, 1951

Year	Deficiency	Penalty
1944 Income tax	\$ 95.00	\$
1945 Income tax	255.58	682.15
1946 Income tax	0.00	44.14
1947 Income tax	0.00	137.87
1948 Income tax	0.00	125.15
1949 Income tax	502.32	
1951 Income tax	1,124.15	
Total	\$1,977.05	\$989.31

In making this determination of your income tax liability, it is noted that you did not avail yourself of the privilege of filing a protest.

Inasmuch as you failed to file income tax returns for the years ended December 31, 1945, to December 31, 1948, inclusive, within the time prescribed by law, 25% of the tax has been added thereto in accordance with the provisions of section 291(a) of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. A. D. McNeil, 407 Crocker Building, San Francisco 4, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Adjustments to Net Income
Year: 1944

Adjusted gross income as disclosed by return	\$ 425.42
Unallowable deductions and additional income:	
(a) Rental income	597.85
	<hr/>
Adjusted gross income as corrected	\$1,023.27

Explanation of Adjustments

(a) Rental income is increased by \$597.85 as shown in Exhibit A attached.

Computation of Tax
Year: 1944

Adjusted gross income	\$1,023.27
Number of exemptions—1	
Total tax on \$1,023.27, Column 1, Tax Table	\$95.00
Correct income tax liability	\$95.00
Income tax disclosed by return, page 1—line 6, Original, Account No. 7908710, First California District	0.00
	<hr/>
Deficiency of income tax	\$95.00

Adjustments to Net Income
Year: 1945

Net income as disclosed by return	\$11,791.32
Unallowable deductions and additional income:	
(a) Rental income	623.37
	<hr/>
Net income as adjusted	\$12,414.69

Explanation of Adjustments

(a) Rental income has been increased by \$623.37 as shown in Exhibit A attached.

Computation of Tax
Year: 1945

Net income	\$12,414.69	
Less: Surtax exemption	500.00	
	<hr/>	
Surtax net income	\$11,914.69	
Surtax on \$11,914.69		\$3,367.58
Net income	\$12,414.69	
Less: Normal tax exemption	500.00	
	<hr/>	
Normal tax net income	\$11,914.69	
Normal tax, 3% of \$11,914.69		357.44
		<hr/>
Correct income tax liability		\$3,725.02
Income tax disclosed by return, page 1— line 6, Original, Account No. 300400, August, 1952 List, First California District		3,469.44
		<hr/>
Deficiency of income tax		\$ 255.58
25% delinquency penalty		\$ 682.15
Computation of 25% delinquency penalty:		
Correct income tax liability	\$ 3,725.02	\$3,725.02
Less: Tax assessed on original return	\$3,469.44 996.44	3,469.44
	<hr/>	<hr/>
Deficiency	\$ 2,728.58	\$ 255.58
25% penalty—25% of \$2,728.58	\$ 682.15	\$ 63.89

Adjustments to Net Income
Year: 1946

Net income as disclosed by return	\$11,879.44
Unallowable deductions and additional income:	
(a) Rental income	489.06
	<hr/>
Net income as adjusted	\$12,368.50

[Italics—appeared as alterations in longhand on original.]

Explanation of Adjustments

(a) Rental income as increased by \$489.06 as shown in Exhibit A attached.

Computation of Tax
Year: 1946

Net income	\$12,368.50
Less: Exemption	500.00

Normal tax and surtax net income	\$11,868.50
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Combined tentative normal tax and surtax	\$ 3,350.03
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Less: 5% of tentative tax	167.50
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Total tax	\$ 3,182.53
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Correct income tax liability	\$ 3,182.53
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Income tax disclosed by return, page 1,
line 7, Original, Account No. 300401,
August, 1952 List, First California
District

\$3,005.98

Additional, Account No.

510542—May 13, 1954

List	176.55	3,182.53
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Deficiency of income tax....	\$	0.00
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25% penalty	\$	44.14
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Computation of 25% penalty:

Correct income tax liability	\$ 3,182.53
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Less: Tax liability disclosed by original return	3,005.98
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Deficiency	\$	176.55
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25% penalty—25% of \$176.55	\$	44.14
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Adjustments to Net Income

Year: 1947

Net income as disclosed by return	\$15,016.92
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Unallowable deductions and additional
income:

(a) Interest	\$909.62
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(b) Rental income	325.49	1,235.11
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Net income as adjusted	\$16,252.03
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Explanation of Adjustments

(a) An analysis of interest received on mortgage loans disclosed an understatement of interest income of \$909.62 as reported.

(b) Rental income has been increased by \$325.49 as shown in Exhibit A attached.

Computation of Tax
Year: 1947

Net income		\$16,252.03
Less: Exemption		500.00
		<hr/>
Normal tax and surtax net income		\$15,752.03
Combined tentative normal tax and surtax		\$ 5,083.45
Less: 5% of tentative tax		254.17
		<hr/>
Correct income tax liability		\$ 4,829.28
Income tax disclosed by return, page 1, line 7, Original, Account No. 300402, August, 1952 List, First California District	\$4,277.80	
Additional, Account No. 510543, May 13, 1954 List	551.48	4,829.28
	<hr/>	<hr/>
Deficiency of income tax		\$ 0.00
25% delinquency penalty		\$ 137.87
Computation of 25% penalty:		
Correct income tax liability	\$4,829.28	
Less: Income tax disclosed by original return	4,277.80	
	<hr/>	
Deficiency	\$ 551.48	
25% penalty—25% of \$551.48	\$ 137.87	

Adjustments to Net Income

Year: 1948

Net income as disclosed by return.....		\$15,124.24
Unallowable deductions and additional income:		
(a) Interest	\$659.50	
(b) Rental income	557.22	1,216.72
	<hr/>	<hr/>
Net income as adjusted		\$16,340.96

Explanation of Adjustments

(a) An analysis of interest received on mortgage loans disclosed an understatement of \$659.50 in interest income as reported.

(b) Rental income is increased by \$557.22 as shown in Exhibit A attached.

Computation of Income Tax

Year: 1948

Net income	\$16,340.96	
Less 2 exemptions at \$600.00 each	1,200.00	
	<hr/>	
Normal tax and surtax net income.....	\$15,140.96	
Tentative tax		\$4,796.25
Less: 17% on \$ 400.00	\$ 68.00	
12% on 4,396.25	527.55	595.55
	<hr/>	<hr/>
Correct income tax liability		\$4,200.70
Income tax disclosed by return, Original, Account No. 300500, August, 1952 List —First California District	\$ 3,700.13	
Additional Account No. 510544— May 13, 1954 List	500.57	4,200.70
	<hr/>	<hr/>
Deficiency in income tax		\$ 0.00
25% penalty		\$ 125.15
Computation of 25% penalty:		
Correct income tax liability	\$ 4,200.70	
Less: Tax liability disclosed by original return	3,700.13	
	<hr/>	
	\$ 500.57	
25% penalty—25% of \$500.57	\$ 125.15	

Adjustments to Net Income

Year: 1949

Net income as disclosed by return		\$15,969.42
Unallowable deductions and additional income:		
(a) Rental income	\$539.73	
(b) Business income	674.77	1,214.50
	<hr/>	<hr/>
Net income as adjusted		\$17,183.92

Explanation of Adjustments

(a) Rental income is increased by \$539.73 as shown in Exhibit A attached.

(b) Available information discloses that business income was understated in the amount of \$674.77.

Computation of Income Tax

Year: 1949

Net income	\$17,183.92	
Less 2 exemptions at \$600.00 each	1,200.00	
	<hr/>	
Normal tax and surtax net income	\$15,983.92	
Tentative tax		\$5,192.44
Less: 17% on \$ 400.00	\$ 68.00	
12% on 4,792.44	575.09	643.09
	<hr/>	<hr/>
Correct income tax liability		\$4,549.35
Income tax disclosed by return, Original, Account No. 300802, August 1952 List, First California District		4,047.03
		<hr/>
Deficiency in income tax		\$ 502.32

Adjustments to Net Income

Year: 1951

Net income as disclosed by return		\$19,022.41
Unallowable deductions and additional income:		
(a) Interest	\$ 883.48	
(b) Rental income	1,239.17	2,122.65
	<hr/>	<hr/>
Net income as adjusted		\$21,145.06

Explanation of Adjustments

(a) An analysis of interest received on mortgage loans disclosed an understatement of \$883.48.

(b) Rental income is increased by \$1,239.17 as shown in Exhibit A attached.

Computation of Alternative Tax
Year: 1951

Net income	\$21,145.06	
Less: Excess of net long-term capital gain over net short-term capital loss....	418.93	
Ordinary net income	\$20,726.13	
Less 2 exemptions at \$600.00 each	1,200.00	
Normal tax and surtax net income	\$19,526.13	
Tentative tax		\$7,140.11
Partial tax		\$7,140.11
50% of excess of net long-term capital gain over net short-term capital loss....		209.47
Alternative tax		\$7,349.58

Computation of Income Tax
Year: 1951

Net income	\$21,145.06	
Less 2 exemptions at \$600.00 each	1,200.00	
Normal tax and surtax net income	\$19,945.06	
Tentative tax		\$7,366.33
Total alternative tax		\$7,349.58
Correct income tax liability		\$7,349.58
Income tax disclosed by return, Original, Account No. 301353, First California District		6,225.43
Deficiency in income tax		\$1,124.15

Audit Report By [Indistinguishable].

Received and filed September 27, 1954, T.C.U.S.

Served September 28, 1954.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations in paragraph 1.

2. Admits that the notice of deficiency was mailed to petitioner on or about the 30th day of June, 1954, and was received by her shortly thereafter.

3. Admits that the deficiencies as determined by the Commissioner are in income taxes for the calendar years 1944, 1945, 1949 and 1951; admits that the penalties asserted by the Commissioner are for the alleged failure by petitioner to file timely returns, and in respect to which the following years and amounts of said penalties are here in dispute:

Calendar Year	Penalty
1945	\$682.15
1946	44.14
1947	137.87
1948	125.15

4. Denies the allegations of error in paragraph 4 and in subparagraphs (a) and (b) thereunder.

5 (a) and (b). For lack of information, denies the allegations in subparagraphs (a) and (b) of paragraph 5.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination in all respects be approved and the petitioner's appeal denied.

/s/ DANIEL A. TAYLOR,
Chief Counsel,
Internal Revenue Service.

Filed November 12, 1954, T.C.U.S.

[Title of Tax Court and Cause.]

REQUEST FOR DESIGNATION OF PLACE OF HEARING

Now comes the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and in accordance with Rule 26 of the Court's Rules of Practice.

Requests that the Court designate that the hearing in the above-entitled proceeding be held at San Francisco, California, or vicinity, in order to afford the respective parties an opportunity to produce evidence at the trial with a minimum expense.

/s/ DANIEL A. TAYLOR,
Chief Counsel,
Internal Revenue Service.

Filed November 12, 1954, T.C.U.S.

[Title of Tax Court and Cause.]

SERVICE OF ANSWER AND NOTICE OF
PLACE OF TRIAL

Service is hereby made of respondent's answer and his request for place of trial.

Notice is given that this case has been placed in accordance with said request upon the San Francisco, California, Calendar of the Court for trial on the merits in due course, either in the city named or in the vicinity thereof.

If petitioner desires that the trial be held at some place other than the place above named, he may file promptly the original and four copies of a proper motion to change the place of trial as provided in the Rules of the Court.

You should contact the attorney whose name and address appear on the enclosed answer in an effort to stipulate all or as many as possible of the material facts in accordance with Rules 30 and 31(b) of the Rules of Practice before the Tax Court of the United States.

/s/ VICTOR S. MERSCH,
Clerk.

To: A. D. McNeil, Esquire,
1104 Hobart Building,
San Francisco 4, California.

[Title of Tax Court and Cause.]

NOTICE OF SETTING PROCEEDING
FOR TRIAL

Take Notice that the above-entitled proceeding is included on a calendar of cases set for trial before a Division of the Tax Court of the United States as indicated above.

That calendar will be called at 10:00 a.m. on the date indicated above and you will be expected to answer the call at that time and be prepared for trial when the above-entitled proceeding is reached. Continuance will be granted only for extraordinary cause. Failure to appear will be taken as cause for dismissal in accordance with Rule 27 (b) (3) of the Court's Rules of Practice.

You are expected to be familiar with the Court's Rules of Practice in all other respects.

Your attention is called particularly to Rule 31(b) which requires that the parties stipulate facts and evidence to the fullest possible extent prior to the call of the calendar. You should confer with your adversary promptly in order to comply with that rule.

Respectfully,

/s/ HOWARD P. LOCKE,
Clerk.

Served July 20, 1956.

[Title of Tax Court and Cause.]

COMPUTATION FOR ENTRY
OF DECISION

The attached computation reflecting deficiencies in penalty under Section 291(a) of the Internal Revenue Code for 1939 in the respective amounts of \$682.15, \$44.14, \$137.87 and \$125.15 for the taxable years 1945, 1946, 1947 and 1948, respectively, is submitted on behalf of the respondent in compliance with the opinion of the Court determining the issues in this proceeding.

The computation is submitted without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court pursuant to the statute in such cases made and provided.

/s/ NELSON P. ROSE,
Chief Counsel,
Internal Revenue Service.

Of Counsel:

MELVIN L. SEARS,
Regional Counsel;

T. M. MATHER,
Assistant Regional Counsel;

EDWARD H. BOYLE,
Special Attorney,
Internal Revenue Service.

Without prejudice to the right of appeal, it is agreed that the attached computation is in accordance with the opinion of the Tax Court in the above-entitled proceeding.

/s/ TOM B. MARKLEY,
Counsel for Petitioner.

Ap:SF:AA:MHB

Computation Statement

In re: Babetta Schmidt,
1395 Hampshire Street,
San Francisco, California.

Docket No. 54932

Income Tax

Year	Section 291(a) Penalty
1945	\$682.15
1946	44.14
1947	137.87
1948	125.15
<hr/>	
Total	\$989.31

Recomputation of tax liability has been prepared in accordance with the memorandum opinion of the Tax Court of the United States entered May 14, 1957.

Explanation of Adjustments

Pursuant to the opinion of the Tax Court of the United States filed May 14, 1957, the petitioner's

failure to file timely returns for the years in controversy was not due to reasonable cause. The 25 per cent additions to tax under Section 291(a). Internal Revenue Code of 1939 are:

1945	.....	\$682.15
1946	.....	44.14
1947	.....	137.87
1948	.....	125.15
		<hr/>
Total	.....	\$989.31

Original returns filed June 30, 1952.

Deficiency notice mailed June 30, 1954.

Filed July 31, 1957, T.C.U.S.

[Title of Tax Court and Cause.]

ENTRY OF APPEARANCE

The undersigned, being duly admitted to practice before the Tax Court of the United States as Attorney * * * herewith enters his appearance for the petitioner in the above-entitled proceeding.

/s/ TOM B. MARKLEY,
Attorney.

Served August 29, 1956.

Filed August 29, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

MINUTES OF PROCEEDINGS

August 27, 1956

Counsel:

For Petitioner:

TOM B. MARKLEY, ESQUIRE.

For Respondent:

E. H. BOYLE, ESQUIRE.

Action: Case submitted after trial.

Filed at hearing: Entry of appearance of Tom B. Markley. Written Motion to amend petition (Granted 8/29/56). Amended petition and answer to amended petition. Stipulation of facts.

Petitioner's brief: Original 10/29/56. Reply 11/29/56.

Respondent's brief: Original 10/29/56. Reply 11/29/56.

Witnesses for Petitioner:

Babetta Schmidt, 8/29/56;
Stephen J. Farrelly, 8/29/56;
Walter J. Schmidt, 8/29/56;
Henry A. Shaw, 8/29/56.

Exhibits

Petitioner's:

No. 1—Statement of bills and payments by petitioner to Mr. Farrelly.

Respondent's:

A—Income Tax Return of Babetta Schmidt for 1944.

B—Income Tax Return of Babetta Schmidt for 1945.

/s/ HOWARD P. LOCKE,
Deputy Clerk.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true, without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith:

1. Petitioner filed Form 1040 ES, Declaration of Estimated Tax, in each of the years 1944, 1946, 1948, 1949, 1950 and 1951.

2. With each Form 1040 ES petitioner made a tax payment to the Internal Revenue Service.

3. Delinquent individual income tax returns, Form 1040, for the years 1944 to 1949, inclusive, and for the year 1951 were filed by petitioner with the First Collection District of California on June 30, 1952. The return for 1950 was timely filed on August 15, 1951, pursuant to an extension of time

granted by the Collector (now Director) of Internal Revenue.

4. Upon receipt of the delinquent returns the Commissioner of Internal Revenue assessed the taxes due as disclosed by the returns, plus 25% penalties pursuant to Section 291(a) of the Internal Revenue Code of 1939. The penalties so assessed, and now in issue, are as follows:

1945	\$249.11
1947	444.45
1948	175.03
1951	245.09

5. Upon audit of the delinquent returns the Commissioner determined deficiencies for certain years, and also added 25% penalties to said deficiencies pursuant to Section 291(a) of the Internal Revenue Code of 1939. These penalties are those asserted in the notice of deficiency and are in issue also:

1945	\$682.15
1946	44.14
1947	137.87
1948	125.15

6. The petitioner has made payments on her income tax liability for the year 1951 in the amount of \$7,475.43.

It is further stipulated that if petitioner is permitted to amend her petition to raise an issue relative to applying 1944 payments of estimated tax

against 1945 tax liability, and if respondent is permitted to amend his answer on that same point, that the following facts shall be taken as true:

7. Petitioner's declaration of estimated tax for the year 1944 estimated her tax liability at \$2,473.00. She made payments to the Internal Revenue as follows:

April 15, 1944	\$618.25
June 14, 1944	618.25
September 11, 1944	618.25
January 4, 1945	618.25

8. Petitioner's 1944 individual income tax return, Form 1040, filed on June 30, 1952, as stated in paragraph 3, *supra*, indicated no liability and requested that the overpayment of \$2,473.00 be credited on the 1945 estimated tax. No Form 1040 ES, Declaration of Estimated Tax, was ever filed for the year 1945.

9. Petitioner's 1945 individual income tax return, Form 1040, filed on June 30, 1952, as stated in paragraph 3, *supra*, reflected the \$2,473.00 on line 7(B) as a payment on a 1945 declaration of estimated tax. The tax liability shown on line 6 was then reduced by the \$2,473.00, leaving a balance of tax due on line 8.

10. The Commissioner has determined deficiencies for 1944 and 1945 and has applied a portion of the \$2,473.00 in payment of the deficiency for 1944, i.e., \$95.00. No part of the \$2,473.00 has been al-

lowed in satisfaction of petitioner's tax liability for 1945 or any later year.

/s/ A. D. McNEIL,
Counsel for Petitioner.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

Filed August 29, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

MOTION TO AMEND PETITION

Comes now the petitioner by her attorney Tom B. Markley, and respectfully moves the Court for leave to amend her petition by adding the following to paragraph 3 after "1951" and before "the penalties" in here of what is there written: "but the deficiencies for 1945 and 1951 are the only ones in dispute; the amount of \$1,250.00 is in dispute for 1951 and the amount of \$2,378.00 is in dispute for 1945 and the following paragraph 4(c) at the end of paragraph 4 of the petition heretofore filed in the above entitled proceeding:

"4(c) With respect to the tax year 1945, respondent should have found and determined that the total tax paid by petitioner during and for said year was the amount of \$3,469.44"; and the respondent failed and refused to credit against 1945 liability the overpayment of estimated tax for the year 1944 in

amount of \$2,473.00 by adding the following paragraph 5(c) at the end of paragraph 5 of the petition heretofore filed in the above-entitled proceeding:

“5(c) Petitioner filed an estimate for the calendar year 1944 and made the following payments thereon:

April 15, 1944.....	\$ 618.25
June 14, 1944.....	618.25
September 11, 1944.....	618.25
January 4, 1945.....	618.25
	<hr/>
Total	<u>\$2,473.00</u>

Due to the inadvertence of her then public accountant petitioner failed to file her Federal income tax return for the calendar year 1944 until June 30, 1952, at which time and because of the same inadvertence of said accountant returns for the calendar year 1945-1949, inclusive, were filed. Petitioner's 1944 individual income tax return Form 1040 filed on June 30, 1952, as aforesaid, indicated no liability and requested that an overpayment of \$2,473.00 be credited on the 1945 estimated tax. Petitioner's 1945 return, filed on June 30, 1952, as aforesaid, requested that said overpayment of \$2,473.00 be credited against the tax for said year. The respondent, however, has determined deficiencies for 1944 and 1945 and has applied a portion of the \$2,473.00 in payment of the deficiency for 1944, i.e., \$95.00. But aside from the said \$95.00 no part of the \$2,473.00 has been allowed in satisfaction of petitioner's tax

liability for 1945, or any later year," and, by adding the following paragraph 6(e) at the end of paragraph 6 of the petition heretofore filed in the above-entitled proceeding:

"6(e) That the tax liability of Petitioner for the calendar year 1945 was and is the sum of \$3,725.02. Petitioner is entitled to a credit thereon in the sum of \$2,378.00 on account of an unused credit for the calendar year 1944 (\$2,473.00 less the \$95.00 applied thereto for the calendar year 1944) carried forward on her 1945 tax and petitioner paid the sum of \$996.45 upon filing her return for the year 1945, and there is a deficiency in income tax for the year 1945 in the sum of \$350.58."

The within motion is made upon the following facts and circumstances: Since the filing of the petition herein and the respondent's answer thereto, the Director of Internal Revenue has issued his demand for payment against petitioner on Form 21A, for the year 1945 in the amount of \$2,473.00 plus interest. Despite the fact that the Commissioner of Internal Revenue in his notice of deficiency, a true copy whereof is appended to the petition herein, asserted no such deficiency of \$2,473.00 for said year 1945; and, until the issuance by the District Director of a demand for payment, taxpayer had no notice of any disallowance of said credit or that the same was in issue. Therefore, the dispute by the petitioner and respondent as to whether petitioner, in computing the amount due the government in the year in question, correctly took the aforesaid credit of \$2,473.00,

cannot be resolved in this proceeding, and taxpayer will be forced to seek an injunction against the Director of Internal Revenue restraining him from collecting said tax unless petitioner is allowed to amend her petition herein, thereby framing the issue.

Dated: August 28, 1956.

/s/ TOM B. MARKLEY,
Attorney for Petitioner.

Granted August 29, 1956, Clarence V. Oppen,
Judge.

Served August 29, 1956.

[Title of Tax Court and Cause.]

AMENDMENT TO PETITION

Comes now the petitioner and by leave of Court first had and obtained amends her petition on file herein by adding the following so that paragraph 3 as amended now reads as follows:

“3. The deficiencies as determined by the Commissioner are in income taxes for the calendar years 1944, 1945, 1949 and 1951, but the deficiencies for 1945 and 1951 are the only deficiencies in dispute. The amount of \$1,250.00 is in dispute for 1951 and the amount of \$2,378.00 is in dispute for 1945. The penalties asserted by the Commissioner are for the alleged failure by petitioner to file timely returns,

and in respect to which the following years and amounts of said penalties are here in dispute:

Calendar Year	Penalty
1945	\$682.15
1946	44.14
1947	137.87
1948	125.15

Also involved in this proceeding are like penalties asserted and collected by the Collector and/or Director at the time said returns were filed. Such payments of penalties (which are exclusive of the foregoing) were all paid by petitioner to said Collector and/or Director and are as follows:

Calendar Year	Penalty Asserted and Paid
1945	\$257.40
1947	459.29
1948	180.88
1951	246.82"

and by adding the following paragraphs:

"4(c) With respect to the tax year 1945, respondent should have found and determined that the total tax paid by petitioner during and for said year was the amount of \$3,469.44; and the respondent failed and refused to credit against 1945 liability the overpayment of estimated tax for the year 1944 in the amount of \$2,473.00."

"5(c) Petitioner filed an estimate for the calendar year 1944 and made the following payments thereon:

April 15, 1944.....	\$ 618.25
June 14, 1944.....	618.25
September 11, 1944.....	618.25
January 4, 1945.....	618.25
<hr/>	
Total	\$2,473.00
<hr/> <hr/>	

Due to the inadvertence of her then public accountant Petitioner failed to file her Federal income tax return for the calendar year 1944 until June 30, 1952, at which time and because of the same inadvertence of said accountant returns for the calendar year 1945-1949, inclusive, were filed. Petitioner's 1944 individual income tax return Form 1040 filed on June 30, 1952, as aforesaid, indicated no liability and requested that an overpayment of \$2,473.00 be credited on the 1945 estimated tax. Petitioner's 1945 return, filed on June 30, 1952, as aforesaid, requested that said overpayment of \$2,473.00 be credited against the tax for said year. The respondent, however, has determined deficiencies for 1944 and 1945 and has applied a portion of the \$2,473.00 in payment of the deficiency for 1944, i.e., \$95.00. But aside from the said \$95.00 no part of the \$2,473.00 has been allowed in satisfaction of Petitioner's tax liability for 1945, or any later year."

"6(e) That the tax liability of Petitioner for the calendar year 1945 was and is the sum of \$3,725.02. Petitioner is entitled to a credit thereon in the sum of \$2,378.00 on account of an unused credit for the calendar year 1944 (\$2,473.00 less the \$95.00 applied

thereto for the calendar year 1944) carried forward on her 1945 tax and Petitioner paid the sum of \$996.45 upon filing her return for the year 1945, and there is a deficiency in income tax for the year 1945 in the sum of \$350.58.”

Respectfully submitted,

/s/ TOM B. MARKLEY,

Attorney for Petitioner.

Filed August 30, 1956, T.C.U.S.

Served August 30, 1956.

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the amendment to petition filed by the above-named petitioner admits and denies as follows:

3. Admits the deficiencies as determined by the Commissioner are in income taxes for the calendar years 1944, 1945, 1949 and 1951, but that the deficiencies for 1945 and 1951 are the only deficiencies in dispute. Admits the penalties asserted by the Commissioner are for the alleged failure by petitioner to file timely returns, and in respect to which

the following years and amounts of said penalties are here in dispute:

Calendar Year	Penalty
1945	\$682.15
1946	44.14
1947	137.87
1948	125.15

Denies the remaining allegations in paragraph 3 of the amendment to petition.

4(c) Denies the allegations of error in subparagraph (c) of paragraph 4 of the amendment to petition.

5(c) Denies the allegations contained in subparagraph (c) of paragraph 5 of the amendment to petition.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ JOHN POTTS BARNES,
Chief Counsel,
Internal Revenue Service.

Filed August 30, 1956, T.C.U.S.

Served August 30, 1956.

The Tax Court of the United States

Docket No. 54932

BABETTA SCHMIDT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

August 29, 1956

Before: Honorable Clarence V. Opper, Judge.

Appearances:

TOM B. MARKLEY, ESQ.,

Appearing for the Petitioner.

EDWARD H. BOYLE, ESQ.,

(Honorable John Potts Barnes, Chief
Counsel, Bureau of Internal Revenue),

Appearing for the Respondent.

PROCEEDINGS

The Court: Docket 54932, Babetta Schmidt.

State your appearances for the record, please.

Mr. Markley: Tom B. Markley for the petitioner.

Mr. Boyle: Edward H. Boyle for the respondent.

The Court: Let me have the file, please.

Mr. Markley: I would like to lodge with the clerk my appearance in this matter.

The Court: Proceed, please.

Mr. Markley: As of this time, if the Court please, the petitioner wishes to move to amend the petition, and I have prepared a written motion to that effect which sets forth the amendment requested, which I shall lodge with the clerk, if I may.

The Clerk: Motion to amend the petition is filed.

The Court: Are you familiar with this, Mr. Boyle?

Mr. Boyle: Yes, I am, your Honor. We have also stipulated that if it is amended and if the respondent is allowed to answer, that certain facts will be taken as true, and that is included in the stipulation of fact, partial stipulation that we intend to file. I do not have an answer. Of course, he does not have the petition. It is just the motion; a written motion.

The Court: You do not have the petition?

Mr. Markley: Well, there is a petition on [3*] file.

The Court: I understand, but I mean the amended petition.

Mr. Markley: The amended petition is set forth in the motion, and if the motion is granted, then I understand that we file the amendment to the petition. Its body is set forth in the motion.

The Court: What would be the effect of this amendment?

Mr. Markley: It puts in issue the claimed credit of the petitioner of the \$2,400 and some odd dollars paid in the 1944 estimate of income tax, and when she filed her 1945 return she asked that there be a credit upon her 1945 tax. This credit was never

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

specifically disallowed in the Commissioner's determination of deficiency in this case, and it was the understanding of Mr. McNeil, who was handling the case and presented the petition, that the government had raised no issue about the allowance of this credit, and it was not until the director here issued his demand for payment of that sum that it came to his attention that the government intended not to honor this credit.

The Court: Wouldn't that go to the size of the deficiency for that year?

Mr. Markley: Well, it goes to the amount of the unpaid tax, yes.

The Court: That is the deficiency, isn't it? [4]

Mr. Markley: Well, that was never set forth in the Commissioner's determination as a deficiency.

The Court: I am trying to find out whether this has to do with deficiency or penalty.

Mr. Markley: It has to do with both, your Honor.

The Court: It does have to do with the deficiency?

Mr. Markley: Yes.

The Court: If you will read your paragraph 3 of the original petition you will find it says: "The deficiencies as determined by the Commissioner are in income taxes for the calendar years 1944, 1945, 1949, and 1951" of which \$1,250 is in dispute, but with respect to the calendar year 1951 only.

Mr. Markley: Well, as I attempted to point out, your Honor, at the time this petition was drafted——

The Court: But you are amending the petition. You don't want to amend that?

Mr. Markley: Oh, I see your point. Yes, I guess we do wish to amend that to say for the year 1945 also.

The Court: And I would hope with respect to an amount. You have in here that the amount of \$1,250 is with respect to 1951. I would hope there would be a corresponding statement as to the amount in dispute with respect to 1945.

Now, does that mean that you want to take this back and do it right?

Mr. Markley: I think it does. [5]

The Court: I won't go to trial in a case where the pleadings are not complete. Can you do it in long hand?

Mr. Markley: Well, I believe I can.

The Court: Now, before we go ahead with that, Mr. Boyle, what is your position about this motion?

Mr. Boyle: The motion is that they properly amend their petition and that we be allowed to amend our answer. We do not object to that procedure, and also putting this particular question into issue which is whether you can apply a 1944 payment on estimated tax against 1945 liability. Actually it has to do with payment, as you first think of it, so unless they request a refund for the year 1945 I am not sure that the Court has jurisdiction. But we have no objection to the Court taking the issue, assuming jurisdiction.

The Court: That same paragraph I read says: "The deficiencies as determined by the Commissioner

are in income taxes for the calendar years 1944, 1945'' and so on. Is that incorrect?

Mr. Boyle: The penalties are in issue for those years. We have stipulated about the deficiency for 1951, so in the present posture of the case there is no deficiency at all except with regard to the penalties.

The Court: What about the deficiency for 1944? Was there one determined?

Mr. Boyle: Yes, there was, and they are raising no [6] issue about it.

The Court: You say this ought to be applied on 1944 rather than 1945. It wouldn't necessitate a claim for refund. It would be applied against the 1944 deficiency, if that is the right place to put it.

Mr. Boyle: Possibly I can make it a little more clear with a statement of what happened.

The Court: Well, if it is necessary I would like to clear away this matter of the pleadings before we get into that.

Mr. Boyle: I think it is a little complex, and I think the Court must decide just exactly what we are doing with——

The Court: As I understand it—I don't mean to prevent you from making a statement, but I still would like to avoid doing it now if possible.

As I understand it, you would have no objection to this motion to amend the petition?

Mr. Boyle: That is true.

The Court: And you will be prepared to answer presumably orally now and then follow it up with a written pleading?

Mr. Boyle: Yes, sir.

The Court: That being so, it seems to me the only question is what is the proper thing for that amendment to say. We are really just helping out the petitioner here and trying [7] to get him straightened out. I understand you to say that this amount about which the controversy revolves is an amount of a payment against 1944 estimated tax; is that correct?

Mr. Boyle: Well, it is a question whether you can apply the payment on 1944 estimated tax against 1945 liability.

The Court: I know you say that, but I am trying to go back of that. If there was a deficiency for 1944 there wouldn't be any question you could apply the amount against the deficiency.

Mr. Boyle: The Commissioner has done that. The deficiency determined for 1944 is only \$95. The amount of the estimated tax was \$2,473. There is quite a bit left. It has been applied.

The Court: Then there is no issue about 1944, is that correct?

Mr. Boyle: That is right.

The Court: Then we are back to the question of whether any overpayment can be applied against 1945, is that right?

Mr. Boyle: That is true.

The Court: I don't see any reason why I shouldn't grant this motion then.

Mr. Boyle: I don't either.

The Court: That sounds like an issue of law. I assume you have the facts in shape, and the only

way it can be [8] raised is by having it raised in the petition.

Mr. Boyle: As I say, we have considered this to the point of putting in the partial stipulation of facts necessary for the Court to determine this on the merits if the pleadings are amended to put in issue.

The Court: As I understand it, that is what the petitioner is asking; that is what you are not objecting to.

I will grant the motion.

Now, we come back to this proposed amendment, and I would like to give the petitioner ten minutes.

Mr. Boyle: May I suggest this: Would it be possible to give oral permission for him to amend his petition and it can be done later?

The Court: I will not go into a hearing where the pleadings are not complete. I want the parties to know that is the purpose of pleadings. I want them to know exactly what the issues are, and that must be done before it starts. I don't see any reason why he can't write it out in long hand in ten minutes and add it to his motion here, and then I will be in a position to grant it before we go ahead. Is that satisfactory?

Mr. Markley: That is satisfactory.

The Court: We will take a ten-minute recess.

(Short recess.)

The Court: Are you ready in the Schmidt case?

Mr. Markley: Yes. [9]

I now offer my amended motion to amend.

The Court: You have seen the change, Mr. Boyle?

Mr. Boyle: Yes, I have.

The Court: And you still have no objection to the granting of the motion providing you can answer?

Mr. Boyle: That is correct.

The Court: Very well. The motion will be granted. You will prepare and submit a typewritten copy?

Mr. Markley: Yes. The pleading will be submitted.

The Court: Can you now, Mr. Boyle, state orally your pleading to these amendments?

Mr. Boyle: Yes. Our pleadings will be that we deny we admit the paragraph 3; we admit the deficiencies as determined by the Commissioner on income taxes for the years 1944, 1945, 1949 and 1951, of which only the years 1945 and 1951 are in dispute. As to the rest, we deny that the Commissioner committed error, and we deny the facts as stated in paragraph 5.

The Court: Thank you. Now, you will submit that in writing. How long do you want for that?

Mr. Boyle: As soon as we see their amended petition we will file our amended answer.

The Court: I would like to set times for that. When can you file the submitted petition?

Mr. Markley: I can file it tomorrow, if the [10] Court wishes, or Friday.

The Court: If you could file it tomorrow could you get your answer?

Mr. Boyle: We can file an answer the same day we receive their petition.

The Court: Try to get it in tomorrow, and we can take them both while we are still here, otherwise you will have to send them to Washington. I will give you until tomorrow to file the amended pleading and give Mr. Boyle until Friday afternoon to file the answer.

Proceed, please.

Mr. Markley: Does your Honor wish me to make an opening statement?

The Court: It is generally preferable.

OPENING STATEMENT ON BEHALF OF THE PETITIONER

By Mr. Markley:

The motion to amend the pleading, which has just been granted, and the amended petition will present to the Court the question of whether or not the petitioner is entitled to a credit on her 1945 income tax of the overpayment for 1944 estimate. The facts upon which the petitioner relies in this particular issue are all set forth in the stipulation which—has it been filed, Mr. Boyle?

Mr. Boyle: No.

Mr. Markley: —or will be filed in this [11] matter. The one further issue raised by the petition in this case is with respect to the deficiency in the year 1951, in which the petitioner alleged that the respondent should have found and determined that

the total tax paid by Commissioner for that year was the sum of \$7,475.43, which is paragraph 4a of the petition. The government, as I understand, has admitted that that is true, and that is covered also by the stipulation which will be filed, and I understand there is to be no issue about that in this proceeding.

The remaining issues in the case are the penalties asserted by the Commissioner for the failure of the respondent to file the returns for the years 1944, 1945, 1946, 1947, 1948 and 1949. The Commissioner asserted the ad valorem penalty of 25 per cent against the petitioner in those years, and the petitioner contends that she is not liable for that penalty because of reasonable grounds for not filing the returns and the penalty should not be collected from her. It is that issue that we are prepared to bring forward the witnesses to testify to this morning.

The Court: I am a little in doubt as to part of this. As I understand it, you now agree there is no deficiency for 1944, is that correct?

Mr. Boyle: There is a deficiency asserted in the 90-day letter. It was not put in issue in the petition and is not being put in issue here. They are conceding it. [12]

The Court: Perhaps I am mistaken, but I understood you to say earlier that that was being wiped out by the amount of the——

Mr. Boyle: That had to do with payment which is actually not before the Court. The question of whether there is or is not a deficiency is another matter. There was a deficiency asserted in the 90-

day letter, but the petition makes no point of that. It concedes the deficiency.

The Court: The thing I am leading up to is, however you get to it, whether it is because of prepayment or any other reason, if the taxpayer doesn't owe any money, the ad valorem penalty of 25 per cent of zero is zero. Now, is there no way that it can be worked out that the penalty issue really only applied to those years where there is in effect a conceded deficiency?

Mr. Boyle: Well, I can explain how that came about in a short statement, but I don't think I can do it just answering——

The Court: I am expressing myself now to something I think a little different than what the facts are. I am suggesting the possibility that, whatever you call it, there is in fact now no deficiency for 1944. I didn't think there would have been one in the first place, but I may have been mistaken.

Mr. Boyle: There is none in issue. [13]

The Court: Not in issue, but maybe we are back to the point where it ought to be in issue because if it eliminates the penalty issue and the penalty issue shouldn't be here for that year, then we are just wasting time. Do I make myself clear?

Mr. Boyle: It isn't there for that year. There is no penalty asserted for 1944.

The Court: Well, then, we can forget about 1944.

Now, as to 1945 and 1951, which are the only other years where the deficiencies are in dispute, is there any possibility of doing anything with that? That is to say, would it be a fact that if it were determined

there were no deficiencies, that would automatically eliminate the penalty question for those two years?

Mr. Boyle: No. No, the penalties could still apply, even though there are no deficiencies.

The Court: That is what I am asking you. How can there be a penalty of 25 per cent of zero?

Mr. Boyle: They are conceding the deficiency.

The Court: They are not conceding the deficiencies of 1945 and 1951.

Mr. Boyle: Yes, they are. 1951 merely says it was paid. They conceded it, and we admitted that they paid it.

The Court: What the pleading now says with the amendment, as I understand it, is: "The deficiencies as [14] determined by the Commissioner are in income taxes for the calendar years" so on, of which \$1,250 is in dispute with respect to the year 1951 and \$2,378 is in dispute for 1945.

Mr. Boyle: The year 1951, that was left in there because the original petition had it. The partial stipulation of facts has the language to the effect that that amendment has been paid, so that there is no controversy in this case about the year 1951 on a deficiency; that is, as distinguished from a penalty.

The Court: Was there ever a deficiency, then, in this case?

Mr. Boyle: Yes, there was, and we didn't stipulate as to payment, but to satisfy the petitioner, since it was a fact, we did it. That has no bearing on the case for the Tax Court actually, whether it was paid or not.

The Court: What I am trying to get at—going

back, what you are saying is: You say there was a deficiency here which was later on paid?

Mr. Boyle: That is right.

The Court: And the petitioner, as I understand it, says there is no deficiency?

Mr. Boyle: It was paid after the tax attorney's notice.

The Court: Then I misunderstood. I thought this was an amount which was paid as a payment against the estimate, at [15] least the one in 1945.

Mr. Boyle: I still think I better make my statement to attempt to clear it up.

The Court: Well, all right. If you think that is going to clear it up, go ahead.

OPENING STATEMENT ON BEHALF OF THE RESPONDENT

By Mr. Boyle:

The petitioner filed declarations of estimated tax forms 1040 ES for the years 1944, 1946, and from 1948 to 1951 inclusive, and in those years she paid tax to the Internal Revenue Service; that is, estimated tax for the year 1944, \$2,473 was paid during 1944. Now, no returns were filed in any of those years until June 30 of 1952, at which time returns were filed for all those years.

Now, the returns for 1944 showed no liability, but the return in the proper place indicated that they wanted \$2,473 which had been paid as a declaration of estimated tax applied to 1945 liability. The return

for 1945 showed approximately \$3,400 in liability, and they asked that the \$2,473 prepayment for 1944 be applied against that showing, about \$900 of deficiency. That amount was assessed. The \$900, for instance, was assessed, and immediately a 25 per cent penalty was applied. That is one of those penalties for 1945.

Then the Revenue agent audits those years and for 1944 he determines there is a liability of \$95. For the year [16] 1945 he determined that the liability is about \$3,700, and he recommends that there be no credit of this prepayment for 1944 against that liability. That is all the Revenue agent did. When the 90-day letter went out it determined the deficiency for 1945 by taking the liability determined by the Commissioner, approximately \$3,700, and subtracting from that the liability shown on the return, which is approximately \$3,400. That leaves \$255, and that is the amount asserted in the 90-day letter as a deficiency for 1945.

Then since the prepayment credit had not been allowed against 1945 liability, the Commissioner assessed it as 1945 liability, and the Commissioner can go out and collect that any time as original tax, and that is what the petitioner is trying to prevent by saying apply the 1944 prepayment against that. The Commissioner says no, he can't. The statute of limitations bars that credit. It is not possible to credit that 1944 prepayment against 1945 liability, because under 322 no credit or refund is possible.

Now, that is what is being put in issue; not a de-

ficiency, but whether it has been paid or not, whether the 1945 liability has been paid or hasn't.

The Court: Well, of course, I didn't want to get into the legal issues here. What I was trying to get you to concede was that if, notwithstanding your contention, it were determined there never was any deficiency here for 1945, wouldn't [17] you concede there couldn't be any penalty?

Mr. Boyle: No. If there had never been a deficiency to start with, I would say that.

The Court: That is in effect what I am saying.

Mr. Boyle: Yes.

The Court: It is clear, isn't it, that if this petitioner had filed a return for 1945 and at that time requested that the refund that she would have been entitled to for 1944 should be applied to her tax liability for 1945, that that would have been done?

Mr. Boyle: Yes. Oh, certainly.

The Court: And if that had been done there wouldn't be any deficiency to the extent of that amount of money?

Mr. Boyle: That is right. Then there would only be this smaller deficiency which we have already collected, which is \$249.11. That was because when she filed her return late she showed she owed that much, and the collector immediately asserted deficiency on that.

The Court: What I am trying to say as to that \$249—

Mr. Boyle: We get that anyway.

The Court: Any question about the penalty

doesn't apply, because you can have 25 per cent of \$249, just concentrating on the balance.

Mr. Boyle: Well, now, the balance is this penalty [18] of \$682.15. As I say, that was determined by looking at the liability determined by the Commissioner, approximately \$3,700, and subtracting from that.

The Court: I think I understand the facts. I am just trying to get you to concede that if the decision were, on these facts, there was no deficiency except the \$249, that there couldn't be a penalty of any more than 25 per cent of that \$249, no matter what the evidence showed about reasonable cause and all that sort of thing.

Mr. Boyle: Well, I won't concede that.

The Court: You mean you won't concede the penalty is a percentage of the deficiency?

Mr. Boyle: Yes, I will concede that.

The Court: That is really as far as I think I need to get you to go. I don't mean to shut you off, if you have anything more to say in opening.

Mr. Boyle: The other issue is, as stated by counsel, the penalty, whether there was reasonable cause for the late filing of these returns.

The Court: Those are the only penalties?

Mr. Boyle: Those are the only two issues and, as I say, this first issue.

The Court: I am talking about penalty. There is no penalty for failure to file estimates or anything like that, only the penalty for failure to file a return. [19]

Mr. Boyle: On time. That is all pursuant to Section 291a of the Code.

The Court: Are all these facts in the stipulation?

Mr. Boyle: They are.

The Court: Proceed, please.

Mr. Markley: At this time we offer the stipulation of facts.

The Court: The stipulation will be received. Are there any exhibits attached to the stipulation?

Mr. Markley: None.

The petitioner will call Babetta Schmidt.

Whereupon,

BABETTA SCHMIDT

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please take the stand and state your name and address for the record?

The Witness: Babetta Schmidt.

Direct Examination

By Mr. Markley:

Q. Your name is Babetta Schmidt, is that right?

A. Yes.

Q. And you are the petitioner in this case?

A. Yes.

Q. Mrs. Schmidt, how old are you? [20]

A. 82.

Q. 82? A. Yes.

Q. Where were you born, Mrs. Schmidt?

(Testimony of Babetta Schmidt.)

A. Germany.

Q. How long have you been in the United States?

A. Oh, almost—almost 60 years.

Q. Were you married, Mrs. Schmidt?

A. Yes.

Q. And is your husband now deceased?

A. Yes.

Q. When did he die, Mrs. Schmidt?

A. In 19—1939, I think, yes.

Q. What business was he in?

A. In contract business. He puts up houses.

Q. He fixed up houses?

A. He puts up new houses, yes.

Q. Have you ever been in business, Mrs. Schmidt, for yourself?

A. No, not just for myself—putting up houses.

Mr. Boyle: I didn't hear that.

Q. (By Mr. Markley): Would you repeat your answer? Have you ever been in business?

A. No, not for business other than I have houses that I [21] put up.

Q. Do you understand, Mrs. Schmidt, that you have an obligation to file an income tax return with the United States Government?

A. Yes, but I did.

Q. You do understand that?

A. I did. I had the—I had Mr. Farrelly.

Q. When your husband was alive, Mrs. Schmidt, did he prepare the income tax returns?

A. No, he—I think in 1921.

Mr. Markley: If the Court please, may I ap-

(Testimony of Babetta Schmidt.)

proach the witness a little closer and assist the reporter in getting the answers?

The Court: I think it would be better if you stay where you are, because we won't be able to hear at all.

Mr. Boyle: Did the witness say who prepared the returns?

Mr. Markley: I don't think so. I will repeat the question.

Q. (By Mr. Markley): When your husband was alive, Mrs. Schmidt, did he prepare income tax returns? A. No, no.

Q. Who did?

A. I did or my daughter. [22]

Q. You did or your daughter?

A. I or my daughter, yes; she helped me.

Q. When you say that you prepared the income tax returns when your husband was alive, do you mean that you filled out the government form or that you just prepared the information for the return?

Mr. Boyle: I object to that as an alternative question. Ask it straight, if you will Counsel.

The Witness: Yes, that is how I—the income tax.

Q. (By Mr. Markley): Would you repeat that, Mrs. Schmidt?

A. I prepared—I took it down.

The Court: She brought it down to the Income Tax Office.

The Witness: Yes.

Q. (By Mr. Markley): You brought it down?

(Testimony of Babetta Schmidt.)

A. Yes. I don't know how many times.

Q. Do you know how to fill out the form for the income tax? Do you understand what you have to do?

A. No, not very good. I have to have somebody to—to say how much things I have, and that is all. Mr. Farrelly did it for me the last time.

Q. In other words, you retained somebody to do this income tax work for you, is that right? [23]

A. Yes.

Q. And his name was Mr. Farrelly?

A. Yes.

Q. What business is he in, do you know?

A. Income tax business. He filled out income tax.

Q. Could you tell me when you first hired Mr. Farrelly?

A. I think my son—they had him, too.

Q. Do you remember when that was when you first got Mr. Farrelly? A. Well, isn't he here?

Q. You don't remember, is that it?

A. No.

Q. Can you say whether it was at least 20 years ago that you first hired Mr. Farrelly?

A. No, I think it was back—it was—I didn't think it was that long. Isn't Mr. Farrelly here? Isn't Mr. Farrelly here?

Q. Yes, he is here, and he will be a witness.

The Court: Did you say, "I don't think it was that long"? Is that what you said?

The Witness: Yes. I said papers he filled out.

(Testimony of Babetta Schmidt.)

Q. (By Mr. Markley): How did you happen to hire Mr. Farrelly, Mrs. Schmidt?

A. My son, he sent him to me, and he has been with us. I don't know for how many years. Everything is all right, he [24] said. Everything is all right. He was here. He said everything was all right.

Q. Your son sent him around to do your income tax, is that it? A. Yes.

Q. What did you hire Mr. Farrelly to do for you?

A. To do—fill out the tax, how much tax I have to pay.

Q. Who gave him the information to fill out the income tax, Mrs. Schmidt?

A. I or my daughter.

Q. Where did that information come from? Where did you keep it? A. In the books.

Q. You kept an account book? A. Yes.

Q. And you gave the information to Mr. Farrelly, is that right? A. Yes.

Q. Now, did he come around to get that information? A. Yes.

Q. He came to your house, is that right?

A. Yes, I called him.

Q. Did he come every year, Mrs. Schmidt?

A. Yes.

Q. And every year you gave him the information to fill [25] out the income tax?

A. Yes.

(Testimony of Babetta Schmidt.)

Q. Is that right?

A. Yes, or my daughter, too. We both had some—my daughter, she had, too.

Q. Do you know how long Mr. Farrelly had been working for your sons when you first hired him.

A. No, not too many years, not too many years; not so many years.

Q. He hadn't been working for your son so many years when you first hired him, is that right?

A. No.

Q. Isn't it true, Mrs. Schmidt, that it was about 1932 that you first hired Mr. Farrelly?

A. I think it must be about that, yes.

Q. And you had him every year after that, didn't you?

A. Yes.

Q. Until about 1952, is that right?

A. I think that was the date, 1953.

Q. We didn't hear.

The Court: "I think 1953."

Q. (By Mr. Markley): 1953?

The Court is that what you said?

The Witness: Yes. [26]

Q. (By Mr. Markley): And every year between 1932 and 1953, Mr. Farrelly would come around and you gave him the information for the income tax, is that so?

A. Yes, I ringed him up and told him to come; I or my son. My daughter took him—she is here, too.

(Testimony of Babetta Schmidt.)

Mr. Markley: I realize what I am doing. I am trying to help the witness out a little.

Mr. Boyle: You certainly are.

Mr. Markley: Do you object to my proceeding in this fashion?

Mr. Boyle: You are going pretty far, I would say, in your leading. You are putting all the words in her own mouth. All she has to do is say yes or no.

Mr. Markley; I don't wish to abuse my privileges. I think the question has been asked and answered before, and I am merely trying to preserve continuity here.

Q. (By Mr. Markley): Mrs. Schmidt, in all these years that Mr. Farrelly was working for you on the income tax, did you pay him money?

A. Yes, I paid him \$200, I paid him that time.

Q. How often did you pay him the \$200?

A. I don't know now how often.

Q. Was the \$200 a fixed fee?

A. No, he asked—no, the last—the last time he asked [27] me for \$500. I didn't give him anything.

Mr. Boyle: What?

The Court: The last time he asked her for \$500 and she didn't give him anything.

The Witness: No.

Q. (By Mr. Markley): Did you have an arrangement with Mr. Farrelly that you were supposed to pay him so much every year?

A. No.

Q. You did not? A. No, no.

Q. How did you know how much to pay him?

(Testimony of Babetta Schmidt.)

A. He asked me.

Q. Did he ask you when he came around to get the information or to have you sign the return?

A. I don't know about that. He asked me sometime; yes, he said I owed him \$200 for what he made out.

Q. Mrs. Schmidt, after he would come around to your house and you would give him the information for filling out the income tax return, did he come back again with some papers for you to sign?

A. (Inaudible and not understandable.)

Mr. Markley: I will withdraw that question and ask it another way. [28]

Q. (By Mr. Markley): Do you remember signing some papers for Mr. Farrelly? A. Yes.

Q. Did he ask you to sign papers? Do you know what they were?

A. No, I don't know how much I signed. I don't know.

Q. Do you remember that after you would give him the information that he would come back to your house and ask you to sign papers and ask you for some money for the government?

A. Yes. I paid him. I paid him every year. I don't owe anything.

Mr. Markley: She said she paid the government and doesn't think she owes anything.

Mr. Boyle: She said yes, that is what happened.

Q. (By Mr. Markley): Can you recall, Mrs. Schmidt, whether Mr. Farrelly came around every

(Testimony of Babetta Schmidt.)

year up to 1953 and asked you to sign papers and asked you for money for the government?

A. I ringed him. I ringed him up.

Q. I didn't understand your answer.

A. I ringed him up. I called him and he came around.

Mr. Boyle: She ringed him up. She called him and he came around.

Q. (By Mr. Markley): Mrs. Schmidt, do you know whether or not when Mr. [29] Farrelly would ask you to sign these papers whether you were signing an income tax return or the declaration of estimated tax?

Mr. Boyle: I object to the alternative question.

Mr. Markley: I don't see anything alternative about that. I asked her if she knows which one it was.

The Court: I am going to overrule the objection.

Mr. Markley: Will you read the question, Mr. Reporter?

(Question was read by the reporter.)

The Witness: No, I don't know. I don't know.

The Court: She said she doesn't know.

Q. (By Mr. Markley): Mrs. Schmidt, when did you first discover or learn that some income tax returns had not been filed on time?

A. No——

Mr. Boyle: I object to that as assuming something not in issue, that they weren't filed on time.

(Testimony of Babetta Schmidt.)

Mr. Markley: If you will concede they were filed on time we can all go home.

The Court: Doesn't your stipulation deal with that?

Mr. Boyle: There is nothing in the testimony about that before this witness.

The Court: There is nothing in the rules that says the witness has to know about it. The witness could be out of the room for a week and come in and be asked a question. [30]

Mr. Boyle: I object to the question as leading.

The Court: Leading it certainly is and has been, and I thought we were trying to bear with the situation as much as possible. Of course, if you object I will have to caution counsel not to lead the witness.

Mr. Markley: I will withdraw the question and ask it another way.

Q. (By Mr. Markley): Mrs. Schmidt, did you ever discover that some income tax returns of yours had not been filed on time?

A. No, my son found it out and he said it to me.

Q. He told you about it? A. Yes.

Q. When was that?

A. I don't know; some years back, some time, yes.

Q. Did you ever have a conversation with Mr. Farrelly about some income tax returns that had to be filed?

A. No, he found out that he couldn't find some

(Testimony of Babetta Schmidt.)

of them for my son. My son found it out, and then I thought that was—he didn't find them.

Q. Mrs. Schmidt, did you always feel that you had filed all of the necessary papers and returns for the government?

A. Yes, yes. He said it, too, that I filed it all and I pay everything, sure. He wrote everything down for my daughter and I. [31]

Mr. Markley: No further questions.

Cross-Examination

By Mr. Boyle:

Q. Mrs. Schmidt, you stated that you got the income tax information from the books—that is, Mr. Farrelly got it from the books? A. Yes.

Q. Who kept the books?

A. My daughter. She is here.

Q. She kept the books?

A. Yes. She is here.

Q. Does she still keep them? A. Yes.

Q. Did you say that you had gone down to the offices of the government, the Internal Revenue people?

A. No, that was a long time ago. That was many, many years ago.

Q. Many years ago you used to go down there, is that right? A. Yes.

Q. Is that when your husband was alive?

A. Yes, but I can't say—I made out some lists here myself and some other things. He died now and I ask him about it and he said how he made it out.

(Testimony of Babetta Schmidt.)

That is—(remainder of answer inaudible and not understandable.) [32]

Mr. Boyle: I have no further questions.

Mr. Markley: No questions.

The Court: The reporter didn't hear the last part of that answer. Are you willing to let it go?

Mr. Boyle: Yes, I will let it go.

(Witness excused.)

Mr. Markley: The petitioner will call Mr. Stephen Farrelly to the stand.

Whereupon,

STEPHEN FARRELLY,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please take the stand and state your name and address for the record?

The Witness: My name is Stephen Farrelly, 145 Idora Avenue, San Francisco.

Direct Examination

By Mr. Markley:

Q. What is your business, Mr. Farrelly?

A. None at the present.

Q. None? A. At Present, none.

Q. What has been your business in the past?

A. Tax consultant, auditor, accountant.

Q. Are you a Certified Public Accountant? [33]

(Testimony of Stephen Farrelly.)

A. I am not.

Q. Are you a licensed public accountant?

A. No, sir.

Q. Were you ever?

A. No, sir. I was, naturally, before the State—in '37 I believe; Vocational Standards Act. None required prior to that.

Q. When did you last cease to be a public accountant, Mr. Farrelly?

A. Oh, gradually diminished until about three or four or five years ago when I gave it up.

Q. You have purported to be a public accountant up to and including 1953? A. Yes, sir.

Q. Do you know Babetta Schmidt?

A. I do.

Q. The lady who just testified?

A. Yes, sir.

Q. When did you first start to work for Mrs. Schmidt?

A. My earliest recollection would be 1938.

Q. What did she hire you to do?

A. Prepare state and federal income tax returns.

Q. Anything else?

A. Nothing that I recall.

Q. Did she pay you money for your [34] services? A. She did.

Q. What was the basis?

A. Professional fee basis.

Q. And how much? What was the arrangement between you and Babetta Schmidt?

(Testimony of Stephen Farrelly.)

A. No arrangement.

Q. Describe what you did for Mrs. Schmidt each year.

A. Call on her in her home, gather the data that she had available for determining the tax liability, which would consist of written lists showing rental income and expense, supplemented by verbal information for explanatory purposes.

Q. Did you prepare—withdraw that.

Was it part of your duties of your employment with Mrs. Schmidt to file the Form 1040-ES with the United States Government each year?

A. Yes, that was part of the service rendered.

Q. Was it also part of your duties to prepare and file on her behalf the Form 1040 Income Tax Return?

A. I don't know whether you would consider it a duty, but that was understood.

Q. You understood that was one of the things you were hired to do?

A. Yes, sir.

Q. Now, when did you cease working for Mrs. Schmidt?

A. On the last return that I recall it was for the [35] calendar year 1951.

Q. Did you file on behalf of Mrs. Babetta Schmidt forms 1040-ES for all of the years that you worked for her?

A. I did.

Q. And did you ask her for a remittance to be paid to the United States Government on estimated tax for each of those years?

A. No, sir.

Q. Well, why not?

(Testimony of Stephen Farrelly.)

A. I left it to her to pay. I left the returns with her for her to pay on.

Q. Did you file on behalf of Babetta Schmidt the Form 1040-ES estimated tax for each year; did you file it with the government?

A. I left it up to the taxpayer to do that.

Q. Now, did you file a form income tax return 1040 for the taxpayer in each of the years?

A. Yes, sir. I left it up to my client, the taxpayer, to file them.

Q. You say that you prepared one for each of those years? A. For each of those years.

Q. What did you do with it?

A. Gave them to the—my client, Mrs. Babetta Schmidt.

Q. Did you see that she signed it?

A. In most cases, yes, but in all I am not [36] sure.

Q. And you say you left them with her?

A. Yes, sir.

Q. Did you do that in 1938?

A. As I recall it, I did.

Q. Did you do that in 1939?

A. I believe so.

Q. You left the return with her?

A. I believe so.

Q. How about 1940?

A. I can't single out any year in which I did not.

Q. Do you recall any year in which you personally filed the return?

(Testimony of Stephen Farrelly.)

A. I remember an occasion when she had a cashiers check, I believe, that I took to the collector and gave the return and the cashiers check to the cashier in the collector's office. I don't recall what year it was.

Q. Mr. Farrelly, did you prepare on behalf of the taxpayer in this case a Form 1040 Income Tax Return for the year 1944? A. I did.

Q. What did you do with that income return?

A. That, together with the years immediately subsequent to 1944 were given to Mrs. Schmidt.

Q. When?

A. I think that was in 1952. [37]

Q. When did you prepare those returns?

A. In 1952.

Q. Did you prepare an income tax return—withdraw that.

Did you prepare a 1040-ES for the taxpayer in 1944? A. I did.

Q. Did you prepare it in that year?

A. I did.

Q. Do you know whether or not she made payment on that declaration?

A. I fully believe that she did.

Q. Did you prepare a Form 1040 Income Tax Return for the taxpayer for the year 1944 in the year 1944 or 1945?

A. In—for the calendar year 1941 that federal form 1040, Form 540, was prepared in 1945, and I believe it showed a tax liability.

(Testimony of Stephen Farrelly.)

Q. I didn't ask you what it showed. I wanted to know what did you do with it?

A. I took it to her for signature and payment for whatever tax may be due at that time.

Q. What became of it then?

A. After having prepared the form she called my attention to the fact that she had sustained a loss. I believe she referred to it as a bad debt loan that she had made on her note, or two notes, and she refused to sign the return until [38] those losses were deducted. I prepared another return, and in the meantime she recalled another loss that was deductible in that year, and I think that I made two or three 1040 forms, and there wasn't sufficient time to file it. I wanted her to sign it and file it, and I would amend the return later.

Q. What happened?

A. She declined to accept the form in that—in that form that it was in and insist the losses be shown on the form.

Q. What did you do about it?

A. Nothing at that time, until some years later.

Q. Did you prepare an income tax return for the taxpayer in the year 1945? A. I did.

Q. And when did you do that? A. 1952.

Q. Had you prepared any in 1945 or 1946 for the year 1945? A. The regular Form 1040?

Q. Income Tax Return?

A. Yes, they were prepared.

Q. And what became of that?

A. Filed in 1952.

(Testimony of Stephen Farrelly.)

Q. When was the return that was prepared in 19—strike that.

When was the return that was filed in 1952 actually [39] prepared by you? A. In 1952.

Q. Did you prepare another return, a previous return, for the taxpayer for the year 1945?

A. 1040-ES estimated income.

Q. Did you ever prepare an income tax return for her for the year 1945 prior to 1952?

A. That particular year I don't recall.

Q. Did you prepare a Form 1040-ES declaration of estimated tax for this taxpayer for the year 1945? A. Yes, sir.

Q. And what became of that?

A. Filed in the usual manner, left it with my client.

Q. Did you ask her to sign it?

A. In most cases I did.

Q. In this particular case do you—did you ask her to sign it? A. I don't recall.

Q. Do you know whether or not she did sign?

A. I am not certain that she did.

Q. Did you leave it with her personally?

A. Yes, sir.

Q. Did you prepare an income tax return for this taxpayer for the year 1947?

A. Yes, sir. [40]

Q. And when?

A. I am not certain now whether it was in 1947 to '49. There were two of those years that those returns were prepared and filed, and that year that

(Testimony of Stephen Farrelly.)

you are questioning I am not certain. Those returns were filed currently for which year they applied.

Q. Did you prepare and file on behalf of this taxpayer income tax returns for the years 1944, 1945, 1946, 1947, 1948 and 1949 in the year 1952?

A. Except for two of those years which I believe were filed in the year in which they were due.

Q. Had you prepared returns for any of those years prior to that? That is, prior to 1952?

A. Yes, sir.

Q. Which ones? A. I am uncertain.

Q. Will you state whether or not you went around to Mrs. Schmidt's home each year during 1944, 1945, 1946, 1947, 1948 and 1949 and picked up information for the preparation of the returns?

A. I did.

Q. Can you tell us why those returns were not prepared until 1952? A. My health.

Q. What was the matter with your health? [41]

A. The trouble that used to come and go.

Q. Can you tell us what kind of trouble it was?

A. Arthritis, neuritis. In medical term, ankylosing spondylitis.

Q. When did it first come to your attention, Mr. Farrelly, that income tax returns for these years had not been filed after the tax year?

A. 1945.

Q. When did it first come to your attention, Mr. Farrelly, that income tax returns for Babetta

(Testimony of Stephen Farrelly.)

Schmidt had not been filed for the years 1944, 1945, 1946, 1947 and 1949?

A. Each year, 1948 and '49.

Q. You state that you knew each year those returns had not been filed? A. Yes, sir.

Q. What did you do about it?

A. Called for help.

Q. You did what?

A. Called for assistance.

Q. In what way did you call for assistance, Mr. Farrelly?

A. My wife assisted me and another public accountant came in to finish them up.

Q. When did it first come to your attention that the returns for those years, 1944, 1945, 1946, 1947, 1948 and 1949 [42] had not been filed timely by the taxpayer? A. Each year it was known to me.

Q. I don't understand your answer, Mr. Farrelly. A You asked me——

Mr. Boyle: Object that he is arguing with his own witness.

The Witness: May I state that you asked me——

The Court: Just a minute. I will sustain the objection.

You may ask another question.

Q. (By Mr. Markley): Mr. Farrelly, did you come to the house of the taxpayer in the year 1952 with a group of returns for the years 1944, 1945, 1946, 1947, 1948, 1950, 1951 and 1952?

A. Yes.

(Testimony of Stephen Farrelly.)

Q. You did? A. Yes.

Q. Did you have a conversation with the taxpayer at that time? A. I did.

Q. About those returns? A. Yes, sir.

Q. Did you make a statement to the taxpayer that it had just come to your attention that the returns for those years had been overlooked? [43]

A. Not that I recall having made such a statement.

Q. Did you tell the taxpayer—who was present at that conversation?

A. She only at the time; later was joined by her two sons.

Q. Did you make a statement in front of the taxpayer and her sons to the effect there was nothing to worry about, that you had an extension of time from the Internal Revenue Service?

A. No, sir.

Q. You did not? A. No, sir.

Q. Did you make a statement to them that there was nothing to worry about, that you had a blanket extension of time with the Internal Revenue Service? A. No.

Q. With regard to all of your cases?

A. No, sir.

Q. What did you tell them in connection with the group of returns which you then had in your possession?

A. Mrs. Schmidt was about ready to leave for the country for a visit to Germany, and I suggested

(Testimony of Stephen Farrelly.)

that the tax liability be cleared up and her returns filed before she left.

Q. Was it brought to your attention the necessity of preparing this group of returns and taking them out to Mrs. Schmidt? [44]

A. I realized my inability to carry through, and I called in another accountant to finish them.

Q. I don't think you understood my question.

Mr. Boyle: I don't think this is material or relevant. We are dealing with 1952, all past the years in issue here that he is now questioning the witness about. I object on the grounds that it is irrelevant and immaterial.

The Court: Overruled.

Q. (By Mr. Markley): What was the occasion for your going out to Mrs. Schmidt's house with all of these returns for these years?

A. Well, they were just completed by the accountant that I had assisting me on them, and as long as they were completed they should be filed, paid.

Q. What was the occasion for the preparation of those returns? What called your attention to the necessity of preparing them, having this accountant work on them? A. Nothing special.

Q. Do I understand your testimony to be that it was just then that you had gotten around to preparing and asking the taxpayer to sign these returns?

A. I don't understand that question.

Q. You went out to Mrs. Schmidt's house in

(Testimony of Stephen Farrelly.)

1952 with income tax returns for the years 1944, 1945, 1946, 1947, 1948, 1949, 1950, and 1951; at least you had all of those returns. [45] Had you just gotten around to getting those returns ready for her to sign? A. Yes, sir.

Q. Did Mrs. Schmidt pay you money every year, Mr. Farrelly?

A. I believe so. I am not certain about the calendar year, but I believe it was.

Q. Every year from 1938 up to 1953, or whenever it is that you were discharged?

A. 1950 or '51.

Q. You sent her a bill for 1952, didn't you, \$500 for the preparation of those returns?

A. Yes, sir.

Q. She didn't pay you that? A. No, sir.

The Court: How much longer do you expect to be with this witness?

Mr. Markley: Just to introduce these exhibits.

I take it I may approach the witness for the purpose of showing them to him.

Q. (By Mr. Markley): I show you a group of papers bearing your letterhead, purported to be statements and receipts? A. Yes, sir.

Q. All of these were prepared by you, is that so? [46]

A. With the exception, that would be for this service or the typing.

Q. That was an exhibit to one of your statements, is that so? A. That's correct.

(Testimony of Stephen Farrelly.)

Q. Now, did you give Mrs. Schmidt a receipt for every statement or every bit of money that you got from her? A. Yes, sir.

Q. You did? Did you keep copies of those receipts? A. No, sir.

Q. You have looked through these receipts that I have shown you here, and they certainly don't reflect all of the payments that you ever got from Mrs. Schmidt, do they? You got other payments that were not reflected in here?

A. They should be. She was given a receipt for each payment.

Q. I understand, but these ones I have shown you are not all of them, are they?

A. I am not certain. I do have a list of the payments actually received.

Q. You do? Do you have it with you?

A. Yes, sir.

Mr. Markley: May I suggest we take the noon recess, and I will take a look at this.

The Court: Is that satisfactory, Mr. Boyle? [47]

Mr. Boyle: Satisfactory.

The Court: We will take a recess until 2:00 o'clock.

(Whereupon, at 12:05 o'clock p.m., a recess was taken until 2:00 o'clock p.m., of the same day.) [48]

STEPHEN FARRELLY

resumed his testimony as follows:

Direct Examination
(Continued)

By Mr. Markley:

Q. Mr. Farrelly, at the time of the recess I was asking you about the statements that I showed you. You will recall that the earlier statement of this group is for 1947. Mrs. Schmidt paid you sums of money prior to 1947, did she not?

A. Yes, she did.

Q. She paid you for each year?

A. Each year.

Q. Also called to your attention in these groups of statements, I have no statements for 1948 or 1949. She also paid you sums of money in those years?

A. Yes. In 1948 there was a payment of \$100 made in the early part of the year; February the 12th for \$100, and again December the 31st, 1948, for \$100.

Q. Did she also make payment in 1949?

A. None in 1949.

Q. 1950?

A. One payment in April for \$200.

Mr. Markley: I offer this group of statements into evidence as Petitioner's Exhibit.

Mr. Boyle: Objection. [49]

The Court: It will be received and marked in evidence as one exhibit.

The Clerk: Petitioner's Exhibit No. 1 is received in evidence.

(Testimony of Stephen Farrelly.)

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 1.)

Q. (By Mr. Markley): I show you Petitioner's No. 1 in evidence and ask you to look at it.

Mr. Farrelly, you will note that your handwriting on the top paper there which is the statement for 1947 is quite bad. I take it you were quite ill at that time?

A. Well, able to get around but not physically well.

Q. You will note your handwriting on the statement for 1951 there, please? A. Yes, sir.

Q. Your handwriting is markedly improved at that time?

A. Yes, in both papers here for 1951 an improvement.

Q. You say you were feeling better at that time?

A. Better than I was previously, yes, sir.

Q. Mr. Farrelly, you are appearing here in response to a subpoena, is that correct?

A. Yes.

Q. The subpoena asked you to produce certain papers in [50] connection with your papers you have for Babetta Schmidt? A. Yes, sir.

Q. Did you do that? A. Yes, sir.

Q. May I see them?

Removing from the stack of papers that you have produced, document entitled "Affidavit," I ask you if that was prepared by you?

(Testimony of Stephen Farrelly.)

A. Yes, sir, it was.

Q. Was it prepared by you on or about the date it bears, the 26th day of June, 1952?

A. Yes, sir.

Mr. Markley: I offer this in evidence as Petitioner's next.

Mr. Boyle: I object to that as not the best evidence, and it is immaterial and irrelevant to the issue at hand, it seems to me.

The Court: May I see it?

What about the original?

Mr. Markley: Well, I was going to ask him about the original.

The Court: Well, in the meantime this is nothing but secondary evidence.

Mr. Markley: Very well. [51]

Q. (By Mr. Markley): This is a copy, Mr. Farrelly. What became of the original document.

A. That accompanied the tax returns that were given to the collector.

Mr. Markley: Very well. Do you have those returns here, Mr. Boyle?

Mr. Boyle: Which year is that?

Mr. Markley: He said it accompanied all the returns.

Mr. Boyle: Yes, I have those here.

Q. (By Mr. Markley): On what returns was that statement appended; what years?

A. That statement, I believe, was to cover all of the returns that were being filed at that time; one statement for all.

(Testimony of Stephen Farrelly.)

Mr. Markley: Do you have the original of that statement, Mr. Boyle?

Mr. Boyle: Yes, I intend to file photostatic copies of two years, and in one of these a similar statement is attached. It would—would that serve your purpose?

Mr. Markley: Yes, certainly.

Mr. Boyle: All right. It can go in that way then.

Q. (By Mr. Markley): Did you obtain any extensions of time from the [52] Internal Revenue Service in connection with any of the returns which were filed in 1952, Mr. Farrelly?

A. I am not sure of the year. I believe that it was 1948 or 1949. I requested an extension and the extension was granted.

Q. That is, to the best of your recollection, to the years you have just testified to, is that right?

A. As I recall it. I believe it was a 60-day extension that was requested.

Mr. Boyle: If Your Honor please, the stipulation of facts shows that extension. Isn't that so, Counsel?

Mr. Markley: Oh, yes.

Mr. Boyle: Then so we don't confuse the record, I think that we can rely upon the stipulation of facts in that regard.

Mr. Markley: I might say I am not trying to deviate from the stipulation of facts in this case. I am merely questioning this witness on some of the material features of what he did.

The Court: What paragraph of the stipulation is that?

(Testimony of Stephen Farrelly.)

Mr. Markley: 3.

The Court: Do you want to find out whether it is this witness who got that extension? If that is so, it would not be any violation of the stipulation. [53]

Mr. Markley: Yes. That is one of the purposes of my examination.

The Court: What I think Mr. Boyle has in mind, what I would warn you of is if you are starting out with any fact which is stipulated, you should preface your question with that rather than asking it. Like in this case, you would say it is stipulated that the extension of time was granted to file a 1950 return, and then go ahead and ask the witness whatever question it is you want to ask him.

Mr. Markley: Of course, I take it I am not allowed to lead this witness, and I have to be somewhat——

The Court: Well, you can say, “Who was it, if you know, that procured that extension?”

Mr. Markley: Also this is not exactly a friendly witness.

The Court: I was going to say that no request has been made to me to rule on the question of whether you may cross-examine this witness.

Q. (By Mr. Markley): The stipulation of facts in this case, Mr. Farrelly, is that an extension of time was granted by the collector of Internal Revenue in regard to the return for the calendar year 1950. Was that extension procured by you?

A. Yes, sir.

Q. Were any extensions of time procured by

(Testimony of Stephen Farrelly.)

you as to [54] any other of the years, 1944, 1945, 1946, 1947, 1948 or 1949? A. I can't recall.

Q. Well, to the best of your recollection did you obtain any extensions for those years?

A. There is none that I can state definitely. I have a hazy recollection of a request having been made for the year 1949, but I am not certain of it.

Q. By you? A. By me.

Mr. Markley: I have no further questions of the witness.

Mr. Boyle: I have no questions.

The Court: All right, Mr. Farrelly.

(Witness excused.)

Mr. Markley: The petitioner will call Mr. Schmidt.

Whereupon,

WALTER J. SCHMIDT,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand and state your name and address for the record?

The Witness: Walter J. Schmidt, 4114-23rd Street, San Francisco.

Direct Examination

By Mr. Markley: [55]

Q. Mr. Schmidt, are you related to the petitioner in this case? A. Yes.

(Testimony of Walter J. Schmidt.)

Q. What is your relationship?

A. She is my mother.

Q. Do you know Mr. Stephen Farrelly?

A. Yes, sir.

Q. He is the man who just testified here, is that right?

A. Yes.

Q. When did you first meet Mr. Farrelly?

A. Well, I imagine back in about 1930.

Q. What were the circumstances?

A. Well, my brother and I used to be in the building business, and also we done small carpenter jobs, and we were doing a lot of work for a real estate man by the name of Webb, and I believe he recommended Mr. Farrelly at that time because we was starting to get along and we needed help, you know, in our planning of our income tax.

Q. Did you hire Mr. Farrelly to do something for you?

A. Oh, yes.

Q. What was it?

A. To prepare our income tax returns.

Q. And how long did he do that for you and your brother?

A. Up to about 1951, I think.

Q. Was he continuously employed by you and your brother [56] from 1930 to 1951?

A. Yes, sir.

Q. Do you know how he happened to become employed by your mother?

A. Yes.

Q. What were the circumstances?

A. Well, after we had him a couple of years, the best I can recall, why we recommended him to her

(Testimony of Walter J. Schmidt.)

for—to take care of her business also like he was taking care of ours.

Q. To the best of your recollection what year was that that he was sent to your mother?

A. I would say about '32, maybe '33.

Q. Were you present on an occasion when Mr. Farrelly brought a group of income tax returns over to your mother in 1952? A. Yes.

Q. Would you tell us what happened on that occasion?

A. Well, my mother was leaving for Germany along with my sister. They were to leave the next morning, and being as she has rental income property, why, my brother and I were there to take over what receipts she had on hand—I mean funds, and also to take—well, get a record of when the various people were paid. We happened to be there, and we were in the kitchen at the time the doorbell rang, and she answered the door and they—well, I know somebody came up [57] into the living room; and she had already given us all the money that she had on hand around there, cash to put in the bank for her. So she came into the kitchen and wanted \$500 of it to give Mr. Farrelly, and we wanted to know what for, and then we went in the living room and he had all these returns along with the bill for \$500, and so we told her not to pay him.

Q. What conversation, if any, took place?

A. Well, we wanted to know why they weren't filed. We didn't know they hadn't been filed for all these years, and—well, naturally he said he was sick

(Testimony of Walter J. Schmidt.)

and he just got busy and got them all ready, and there they were.

Q. Did he say anything at that time about there being nothing to worry about, that an extension of time had been granted?

A. Well, he always told us that, even when he was doing our work we were never to worry, everything was all taken care of.

Q. What did he say on that occasion?

A. Well, the best I can recall he told us that there was nothing to worry about, all we had to do was get her to pay up what was due on these various returns, and everything would be all right.

Mr. Markley: No further questions.

Mr. Boyle: No questions. [58]

The Court: All right, Mr. Schmidt.

(Witness excused.)

Mr. Markley: The petitioner will call Mr. Shaw.

Whereupon,

HENRY A. SHAW

called as a witness for and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please take the stand and state your name and address for the record?

The Witness: My name is Henry A. Shaw, 690 Market, Room 1208, San Francisco.

(Testimony of Henry A. Shaw.)

Direct Examination

By Mr. Markley:

Q. What is your business, Mr. Shaw?

A. Public accountant.

Q. Do you know Babetta Schmidt?

A. I do, sir.

Q. What is your relationship to Babetta Schmidt?

A. Client.

Q. How long has she been your client?

A. Since 1952.

Q. You are now her accountant, is that right?

A. Correct.

Q. Have you had occasion to examine the books and records kept by Babetta Schmidt in regard to her rental of [59] property?

A. I have, sir.

Q. And what years do those records cover?

A. The actual records I compiled were the income tax from 1944 through 1952.

Q. Now, I asked you what years do the books cover?

A. Oh, the books themselves go back as far as 1937 on the rental property.

Q. Have you examined those books from 1937?

A. Well, as far as—I looked at them, but as far as compiling the data, I only compiled the data from 1944.

Q. I understand that, but have you examined the books?

A. I have, sir.

Q. In your experience as an accountant, do you

(Testimony of Henry A. Shaw.)

find that those books are adequate in reflecting receipts and disbursements? A. They are, sir.

Q. Do they contain the information which is necessary for the preparation of income tax returns? A. They do.

Mr. Markley: No further questions.

Mr. Boyle: No questions.

The Court: All right.

(Witness excused.)

Mr. Markley: The petitioner rests. [60]

Mr. Boyle: The respondent offers in evidence the petitioner's individual income tax returns for the taxable years 1944 and 1945.

I offer first in evidence the year 1944 as Respondent's first in order.

The Court: Any objection?

Mr. Markley: No objection.

The Court: It will be received and marked in evidence.

The Clerk: Respondent's Exhibit A is received and filed.

(Document above referred to was received in evidence and marked Respondent's Exhibit A.)

Mr. Boyle: I offer petitioner's return for 1945 as Respondent's next in order.

Mr. Markley: No objection.

The Court: It will be received and marked in evidence.

The Clerk: Respondent's Exhibit B is received and filed.

(Document above referred to was received in evidence and marked Respondent's Exhibit B.)

Mr. Boyle: The respondent rests.

Mr. Markley: May I ascertain, Mr. Boyle, whether the tax returns that you have filed bear that statement that I wanted to put into [61] evidence?

Mr. Boyle: One does, Counsel. I beg your pardon, both do.

Mr. Markley: And you will stipulate that that was prepared by Mr. Farrelly as he testified? It is connected up.

Mr. Boyle: No, I don't so stipulate. If the record is clear, it is clear.

The Court: It isn't clear, because you objected to the document that was offered as being secondary evidence. You have the original, and you told Mr. Markley you would produce the original.

Mr. Boyle: I will produce it.

The Court: And from that he assumed he didn't have to question the witness.

Mr. Boyle: I am sorry I misled the Court. I don't object to that as being untrue. I don't know, so I am not going to stipulate to it.

The Court: You had better recall Mr. Farrelly.

Mr. Boyle: I will give counsel the original returns.

Mr. Markley: Mr. Farrelly, will you take the stand, please.

Whereupon,

STEPHEN FARRELLY

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, was examined and testified as follows: [62]

Direct Examination

By Mr. Markley:

Q. I show you an income tax return for the year 1944 for Babetta Schmidt, and I wish to call your attention to the document entitled "Affidavit" which is a part of that return and ask you to read that. A. Yes, sir.

Q. Was that prepared by you, Mr. Farrelly?

A. Yes, sir, it was.

Q. And the facts set forth therein are true, are they? A. Yes, sir.

Q. I show you income tax return for Babetta Schmidt for 1945 and call your attention to an affidavit which is a part of that return, which is similar to the one you have just read. I ask you to read that. A. Yes, sir.

Q. Was that prepared by you?

A. Yes, sir, it was.

Q. The facts therein are true?

A. Yes, sir.

Q. To your own knowledge? A. Yes, sir.

Mr. Boyle: If your Honor please, I object to that part as characterized not due to the fault of the petitioner. This man can testify due to long ill-

(Testimony of Stephen Farrelly.)

ness they weren't filed, [63] but I move that any testimony on his part that everything in there is true, especially that part which says the late filing was not due to any intent on the part—I beg your pardon. I misread it. I ask that my remarks be ignored.

The Court: Thank you.

Mr. Markley: Now, with that foundation I will ask that you stipulate, Mr. Boyle, that the photostatic copy of the returns bearing the photostatic copy of that affidavit which has just been identified and testified to are one and the same, and the photostat may be used in lieu of the original.

Mr. Boyle: Yes, I so agree.

Mr. Markley: That is all, Mr. Farrelly.

The Court: Just a minute, Mr. Farrelly. May I see those exhibits, please?

The Court: I think these are about the same, so would you look at that one statement there, please, and I ask you to look at the last line of that affidavit.

A. Yes, sir.

Q. It reads, "Was due to prolonged illness of my accountant"; is that correct?

A. Yes, Your Honor.

Q. Now, is the accountant, "my accountant," referred to there, is that yourself?

A. Yes, sir. [64]

The Court: Thank you.

I have no further questions.

Mr. Markley: We rest.

The Court: Thank you, Mr. Farrelly.

(Witness excused.)

The Court: I understand the respondent rests also?

Mr. Boyle: The respondent rests.

The Court: Do you want to time the briefs?

Mr. Boyle: 60, 30, if Your Honor please.

The Court: Is that satisfactory?

Mr. Markley: Yes.

The Court: Very well. 60 days for the main brief and 30 days thereafter for each side to reply.

Will you read it?

The Clerk: The main brief will be due October 29, and the reply brief will be due November 29.

Mr. Markley: I take it that these briefs are res-seriatim.

The Court: They are simultaneous. You and the respondent will both file your main briefs and your reply briefs on the same day.

Mr. Markley: I asked to be sure because this is my maiden appearance in the Tax Court.

The Court: Marked submitted.

We will take a recess until tomorrow morning at [65] 10:00 o'clock.

(Whereupon, at 2:35 o'clock p.m., the hearing in the above-entitled matter was closed.)

Filed: September 17, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

1. Petitioner's overpayment of 1944 estimated tax taken as credit against 1945 tax liability, held, to afford no occasion for determination by Tax Court as to either 1944 which was not placed in issue, nor as to 1945, as to which deficiency is conceded and no amount in excess of admitted tax liability is shown to have been paid.

2. Petitioner's failure to file timely individual income tax returns, held, on the facts, not due to reasonable cause.

TOM B. MARKLEY, ESQ.,

For the Petitioner.

EDWARD H. BOYLE, ESQ.,

For the Respondent.

Respondent determined deficiencies in income tax and 25 per cent additions to tax under section 291 (a), Internal Revenue Code of 1939, for failure to file timely returns as follows:

Year	Deficiency	Additions to Tax
1944	\$ 95.00	.....
1945	255.58	\$682.15
1946		44.14
1947		137.87
1948		125.15
1949	502.32	.....
1951	1,124.15	.....

Petitioner claims to have made overpayments for the following additions to tax previously assessed and paid for failure to file timely returns:

Year	Additions to Tax
1945	\$249.11
1947	444.45
1948	175.03
1951	245.09

No deficiencies are in issue. Those for 1944 and 1949 are not contested in the petition. For 1951 respondent concedes that there is no deficiency in income tax and that there is an overpayment of \$125.85. For 1945 petitioner concedes the deficiency determined, but claims error in respondent's failure to give credit on account of \$2,378 from unapplied payment of estimated tax for 1944.

The remaining issues are (1) what, if any, action should be taken with respect to a claimed credit for 1945, based on unapplied payment of estimated tax for 1944, and (2) whether petitioner is subject to the 25 per cent additions to tax for failure to file timely returns.

Findings of Fact

The stipulated facts are hereby found.

Petitioner, born in Germany in 1874, came to this country before 1900. Since her husband's death in 1939, she received rents from certain property. Except for the rental property, petitioner carried on no business activities.

Petitioner understood her obligation to file income tax returns, but had no personal knowledge or ability to prepare returns. Prior to her husband's death, she took information to the local Internal Revenue Bureau office for assistance. About 1932, on her sons' recommendation, she retained the person who prepared their returns, hereafter referred to as the accountant, to do her income tax work. The sons, who were in business, employed the accountant from 1930 to 1951.

Petitioner employed the accountant from 1932 until about 1952 to do her income tax work. The accountant, although never certified or licensed as a public accountant, held himself out to be a tax consultant, auditor, and public accountant through 1953. After 1937 the State of California required licensing of public accountants.

Following petitioner's call to him, the accountant would come to her house for income tax information. She or her daughter recorded certain information in an account book. The book adequately reflected receipts and disbursements and the information necessary to prepare income tax returns. The accountant also would request certain oral explanations.

The accountant would take petitioner's information and return later with papers for her to sign. Petitioner from time to time paid the accountant his requested fees, averaging about \$200 per year, for his income tax services.

The accountant prepared petitioner's income tax returns through 1943. He left the returns with her and she filed them in time. For each of 1944, 1946 and 1948 through 1951 he prepared Forms 1040 ES, Declaration of Estimated Tax, for petitioner, which she signed and which were timely filed. Petitioner made payments with each Form 1040 ES that was filed.

Petitioner did not file timely returns, Form 1040, for 1944 through 1949 and 1951. In 1952, the accountant brought returns for 1944 through 1949 and 1951 to her home for her signature. He gave illness as excuse for the delay. Petitioner's son refused to allow her to pay the accountant a \$500 invoice for services. The accountant assured them that they need not worry if they paid the tax due on the returns. He obtained an extension of time only for 1950.

The accountant prepared an affidavit for petitioner to sign and attach to the returns which stated that the delay in filing

was not due to any intent on my [petitioner's] part to hinder, delay, defraud, evade, or avoid taxation, but was due to the prolonged illness of my accountant.

The accountant prepared the returns in 1952.

On June 30, 1952, petitioner filed delinquent income tax returns for 1944 through 1949 and 1951 with the collector of internal revenue for the first district of California. She timely filed her 1950 re-

turn on August 15, 1951, pursuant to an extension of time granted for that year.

Upon receiving the delinquent returns, respondent determined deficiencies, and additions to tax for failure to file, for certain years for which delinquent returns were filed.

Petitioner's declaration of estimated tax for 1944 showed an estimated liability of \$2,473. She paid \$618.25 on each of April 15, June 14, and September 11, 1944, and January 4, 1945. Her 1944 income tax return, delinquently filed on June 30, 1952, showed no liability and requested that the \$2,473 overpayment be credited against her 1945 estimated tax. Neither she nor anyone acting in her behalf filed a declaration of estimated tax for her for 1945.

On her 1945 income tax return, delinquently filed on June 30, 1952, petitioner entered the \$2,473 as a payment on her 1945 declaration of estimated tax, reducing her income tax liability accordingly. Respondent applied part of the \$2,473 to pay the conceded deficiency determined for 1944. No part of the \$2,473 has been allowed in satisfaction of petitioner's tax liability for 1945 or any later year.

Petitioner's failure to file timely returns for the years in controversy was not due to reasonable cause.

Opinion

Opper, Judge:

The record is not as clear as it might be, but as nearly as can be ascertained, the first issue arises

against the following background: In 1944 petitioner concededly overpaid her estimated tax for that year by some \$2,400. No estimate was filed for 1945, and until 1952 no final returns were filed for the years 1944 through 1949. In the 1944 return filed in 1952, petitioner requested that her 1944 overpayment be applied against estimated tax, and in her 1945 return filed at the same time, she requested that the 1944 overpayment be applied against her tax for 1945. Her 1945 return showed as due only the computed tax less the deducted 1944 overpayment. And apparently only the difference was paid with the return in 1952.

Respondent has determined deficiencies for 1944 and 1945 as well as for two of the other years but none of these deficiencies are in issue. The first controversy appears accordingly to be whether the Tax Court has any basis for determining that there has been an overpayment for 1945 when, in fact, no amount has been paid beyond that concededly due.

In her motion to amend her petition, petitioner states the proposition as follows:

Since the filing of the petition herein and the respondent's answer thereto, the Director of Internal Revenue has issued his demand for payment against petitioner on Form 21A, for the year 1945 in the amount of \$2,473.00 plus interest. Despite the fact that the Commissioner of Internal Revenue in his notice of deficiency * * * asserted no such deficiency of \$2,473.00 for said year 1945; and, until the issuance by the

District Director of a demand for payment, taxpayer had no notice of any disallowance of said credit or that the same was in issue. Therefore, the dispute by the petitioner and respondent as to whether petitioner, in computing the amount due the government in the year in question, correctly took the aforesaid credit of \$2,473.00, cannot be resolved in this proceeding, and taxpayer will be forced to seek an injunction against the Director of Internal Revenue restraining him from collecting said tax unless petitioner is allowed to amend her petition herein, thereby framing the issue. [Emphasis added.]

No appeal has been taken from the determination with respect to 1944, the year when the payment in question was made. The Tax Court accordingly has no jurisdiction over that year. *John R. Thompson Co.*, 10 B.T.A. 57. The record appears to indicate that there has been no overpayment for 1945, or at least petitioner, on whom lay the burden, has not proved otherwise. As petitioner points out, respondent did not determine any deficiency with respect to the 1945 credit for the 1944 overpayment. See *John Moir, et al.*, 3 B.T.A. 21, but see section 271 (b) (1), Internal Revenue Code of 1939. He has hence not found in any determination over which we have jurisdiction that the credit for the overpayment was improperly taken. There is nothing upon which the Tax Court could properly act. We could not determine that there is no deficiency or that there is a deficiency of a different amount since 1944

is not in issue and 1945 is conceded. Cf. Ribbon Cliff Fruit Co., 12 B.T.A. 13, 17. We could not determine that there has been an overpayment for 1944 because that year is not before us, nor for 1945, since the facts do not show that anything more than the tax due, even on petitioner's own statement, has actually been paid.

We intimate no opinion as to whether respondent could now determine a further deficiency in tax for 1945 thereby placing in issue the propriety of the credit taken. But see section 272 (f), Internal Revenue Code of 1939. It may be that under appropriate circumstances petitioner could prevent the threatened assessment and levy by resorting to the injunctive process. See *Repetti v. Jamison* (N.D., Cal.), 131 F. Supp. 626, *affd.* (C.A. 9) 239 F. 2d 901. Upon this possibility also we are required to express no opinion.¹ We conclude only that in the present posture of the case there is no determination which the Tax Court can make on the issue as presented except that the deficiency in income tax for 1945 was properly determined and that there is no overpayment of tax for that year.

¹The parties have stipulated that "No part of the \$2,473.00 has been allowed in satisfaction of petitioner's tax liability for 1945 or any later year," and we have so found. We construe this as meaning merely that respondent has taken no affirmative factual action to allow any such credit. To the extent that he may, as a matter of law, have so acted as to cause some different result to follow, the matter is not factual and cannot be stipulated by the parties, and this, as we have already emphasized, is not being decided here.

On the second issue, we have found it impossible to make the finding requested by petitioner, that she relied upon her accountant to prepare all necessary returns for her and that, therefore, her failure to file any timely final returns whatever for the years in question was due to "reasonable cause."² This results not so much from the question of whether the accountant himself was properly qualified, an issue as to which we find it unnecessary to express an opinion, see *Walter H. Kaltreider*, 28 T.C. (April 23, 1957); *Heatbath Corporation*, 14 T.C. 332; *Hermox Co.*, 11 T.C. 442, affirmed per curiam (C.A. 3) 175 F. 2d 776, as from petitioner's own testimony.

According to her statement, it was her practice to take the initiative in calling upon the accountant for the preparation of any required documents. Her evidence offers no explanation as to the complete absence of any timely returns for the years 1945 and 1947. Even if she might otherwise have thought that a return of estimated tax was sufficient, the record indicates that in those 2 years not even the estimates were filed. And there is no explanation.

The accountant testified that for the year 1945 he prepared and delivered to her a declaration of esti-

²"Sec. 291. Failure to File Return:

"(a) In case of any failure to make and file return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to wilful neglect, there shall be added to the tax: * * *

mated tax. Petitioner was silent as to this point. For whatever reason, the estimate was not filed. 1945 is the earliest of the "penalty" years involved here. The lack of any showing of reasonable cause for the failure to file currently any returns whatever for that year and for 1947 colors petitioner's entire conduct with respect to the whole period. While we need not say that she was guilty of wilful neglect, and indeed respondent concedes this portion of the issue, we cannot on the evidence find that in any of the years the failure to file the final return was due to reasonable cause. Petitioner must have known that the accountant could not be relied upon if he failed to prepare her 1945 estimate. She must have been guilty of indifference to the requirements of the law if she failed to get in touch with him for that purpose, or neglected to file any estimate that was prepared. In either event, her frame of mind indicates a lack of that respect for the legal requirements which would make it possible for us to determine that all of the omissions were due to reasonable cause. See *Rene R. Bouche*, 18 T.C. 144. The facts alluded to distinguish this from such situations as *Herbert Marshall*, 41 B.T.A. 1064, and *Estate of Frederick C. Kirchner*, 46 B.T.A. 578. On this issue respondent is sustained.

Decision will be entered under Rule 50.

Filed and entered May 14, 1957.

Served May 14, 1957.

Tax Court of the United States, Washington

Docket No. 54932

BABETTA SCHMIDT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Respondent having on July 31, 1957, filed a re-computation of tax for entry of decision in accordance with Findings of Fact and Opinion herein, filed May 14, 1957, and petitioner having concurred therein, now, therefore, it is

Ordered and Decided: That there are deficiencies in additions to tax under section 291 (a), Internal Revenue Code of 1939, for the calendar years 1945, 1946, 1947, and 1948, in the respective amounts of \$682.15, \$44.14, \$137.87 and \$125.15.

[Seal] /s/ CLARENCE V. OPPER,
Judge.

Served August 5, 1957.

Entered August 5, 1957.

[Title of Tax Court and Cause.]

ENTRY OF APPEARANCE

The undersigned, being duly admitted to practice before the Tax Court of the United States as Attorney herewith enters his appearance for the petitioner in the above-entitled proceeding.

/s/ ABRAHAM BERRY.

Received and filed August 14, 1957, T.C.U.S.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 54932

BABETTA SCHMIDT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

To the Clerk of the Tax Court of the United States:

Pursuant to the provisions of Rule 29 of the Rules of the United States Court of Appeals for the Ninth Circuit, notice is hereby given that the petitioner above named petitions the United States Court of Appeals for the Ninth Circuit for review of that

certain order and decision of the Tax Court of the United States rendered and issued on the 2nd day of Aug., 1957, Tax Circuit Docket No. 54932.

I.

The petitioner, Babetta Schmidt, is an individual taxpayer, who resides in the city of San Francisco, California. All of the returns for the periods involved herein were filed with the Collector and/or Director of Internal Revenue for the First Collection District, San Francisco, California.

II.

Nature of the Controversy

The controversy involves the proper determination of the petitioner's liability for federal income taxes. The taxes in controversy are as follows:

1. Petitioner claims a credit of \$2,378.00 on income tax for the calendar year 1945, as a result of overpayment of the estimated tax for the year 1944. The Commissioner of Internal Revenue did not allow this credit.

2. The Commissioner of Internal Revenue asserted and collected the following penalties:

Calendar Year	Penalty
1945	\$257.40
1947	459.29
1948	180.88
1951	246.82

and in addition also asserted the following penalties:

Calendar Year	Penalty
1945	\$682.15
1946	44.14
1947	137.87
1948	125.15

Petitioner contends that her failure to file timely her returns for the years 1944-1949, inclusive, and 1951 was due to reasonable cause, and that she was not, therefore, subject to the above penalties under section 291 (a) of the Internal Revenue Code of 1939.

The Tax Court of the United States held that the credit of \$2,378.00 was not allowable on the 1945 income tax return, and that the petitioner's failure to file timely individual income tax returns was not due to reasonable cause, and, therefore, the penalties were properly asserted.

III.

The petitioner, being aggrieved by the decision of the Tax Court of the United States, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ ABRAHAM BERRY,
Counsel for Petitioner.

Duly verified.

Received and filed August 14, 1957.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To John Potts Barnes, Esq., Chief Counsel, Internal
Revenue Service, Washington, D. C.:

You are hereby notified that the petitioner on the 12th day of August, 1957, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated at San Francisco, California, this 12th day of August, 1957.

Respectfully,

/s/ ABRAHAM BERRY,
Counsel for Petitioner.

Proof of service attached.

Received and filed August 14, 1957.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Ralph A. Starnes, Chief Deputy Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 26, inclusive, constitute and are all of the original papers as called

for by the "Designation of Contents of Record on Review," including Petitioner's Exhibit 1, admitted in evidence, and Respondent's Exhibits A and B, admitted in evidence, on file in my office as the original and complete record in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 28th day of August, 1957.

[Seal] /s/ RALPH A. STARNES,
Chief Deputy Clerk, Tax
Court of the United States.

[Endorsed]: No. 15712. United States Court of Appeals for the Ninth Circuit. Babetta Schmidt, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: September 13, 1957.

Docketed: September 18, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 15712

BABETTA SCHMIDT,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF POINTS

The points upon which the Appellant intends to rely on appeal are as follows:

1. The Tax Court of the United States erred in finding that the Appellant's failure to file timely income tax returns for the years 1945, 1946, 1947, 1948 and 1951 was not due to reasonable cause.

2. The Tax Court of the United States erred in finding that the Commissioner of Internal Revenue properly asserted and collected the penalties for the years 1945, 1947, 1948, and 1951.

3. The Tax Court of the United States erred in finding that the Commissioner of Internal Revenue properly asserted the penalties for the years 1945, 1946, 1947 and 1948.

4. The Tax Court of the United States erred in finding that the Appellant could not apply the overpayment of \$2,378.00 on the estimated income tax

for the year 1944 to the income tax for the year 1945.

5. The findings and conclusions as set forth in the Memorandum Findings of Fact and Opinion of the Tax Court of the United States pertaining to the foregoing are contrary to the evidence and not in accordance with law for the following reasons:

(a) The facts found, and upon which the Court's decision is based, and not supported by substantial evidence and are contrary to the testimony of witnesses showing that the Appellant had reasonable cause for not filing her income tax returns timely.

(b) The Court's decision is contrary to the facts found.

(c) The Court erred in failing to find facts undisputably established by the uncontradicted, unimpeached, and unimpaired testimony of the Appellant's witnesses and other evidence offered on behalf of the Appellant.

Dated September 19, 1957.

/s/ ABRAHAM BERRY,
Attorney for Appellant.

Proof of service attached.

[Endorsed]: Filed September 20, 1957, U.S.C.A.